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No. 12522

2636

United States
Court of Appeals
for the Ninth Circuit.

GRACE HARTLEY EMERY, ROBERT W.
EMERY, DANIEL DOUGHERTY and P. S.
DOUGHERTY, Also Known as MRS. DAN-
IEL DOUGHERTY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

FILED

JUN 16 1950

PAUL P. O'BRIEN,

CLERK

No. 12522

United States
Court of Appeals
for the Ninth Circuit.

GRACE HARTLEY EMERY, ROBERT W.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

DANIEL DOUGHERTY,
820 S. Serrano Ave.,
Los Angeles 5, Calif.

For Appellee:

ABE I. LEVY,
FRANK L. HIRST,
STEPHEN D. MONAHAN,
ASHER SCHEIR,
BENJAMIN CHAPMAN,
RICHARD G. SOLOF,
CHRISTIAN V. MURRAY,
EVELYN ST. JOHN,
1206 Santee St.,
Los Angeles 15, Calif.

In the United States District Court, Southern District of California, Central Division

No. 9819-Y

UNITED STATES OF AMERICA,
Plaintiff,
vs.

MRS. GRACE HARTLEY EMERY, ROBERT W.
EMERY, DANIEL DOUGHERTY, P. S.
DOUGHERTY, Also Known as MRS. DANIEL
DOUGHERTY, DOES I TO X,
Defendants.

COMPLAINT FOR TREBLE DAMAGES,
RESTITUTION AND INJUNCTION

I.

Plaintiff brings this action for restitution pursuant to Section 205(a) of the Emergency Price Control Act of 1942, as amended, and brings this action also for injunction, restitution and treble damages pursuant to Sections 205 and 206 of the Housing and Rent Act of 1947, as amended, (Public Law 31, 81st Congress, 1st Session).

II.

Jurisdiction of this action is founded upon Section 205(c) of the Emergency Price Control Act of 1942, as amended, and Section 206 of said Housing and Rent Act of 1947, as amended. [2*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

III.

At all times mentioned herein prior to July 1, 1947, the housing accommodations located at 820-830 South Serrano Avenue, Los Angeles 5, California, have been subject to maximum rents authorized and established pursuant to the Emergency Price Control Act of 1942, as amended. At all times mentioned herein on and after July 1, 1947, said housing accommodations have been subject to maximum rents authorized and in effect pursuant to said Housing and Rent Act of 1947, as amended. At all times mentioned in this complaint said premises have been within the Los Angeles Defense Rental Area.

IV.

That the defendants Doe I to Doe X are the fictitious names of the defendants whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

V.

Defendant received from persons for the use and occupancy of said accommodations rents in excess of the maximum rents established pursuant to said Acts. A schedule is attached hereto and by reference made a part hereof, as though fully set out herein. Said Schedule states the names of the per-

sons using and occupying said accommodations, and the period of occupancy by such persons. Said Schedule states the rents charged to and received from said persons for such use and occupancy during said period. Said Schedule states the applicable maximum rent. Said Schedule states the amount of the overcharges.

VI.

In the judgment of the Housing expediter the defendant has engaged and is about to engage in acts and practices which constitute and will constitute violations of provisions of said Acts and of regulations, orders [3] and requirements issued thereunder.

Wherefore, the plaintiff demands:

A. Judgment for the plaintiff to recover of the defendant treble the total amounts charged to persons, or demanded, accepted or received by the defendant from persons as rent for the use and occupancy of the housing accommodations described in this complaint, within one year prior to the filing of this complaint, which were in excess of the maximum rents established pursuant to said Housing and Rent Act of 1947, as amended and further that:

B. The defendant be ordered and directed to pay to the Treasurer of the United States for and on behalf of all persons entitled thereto a refund of all amounts in excess of the maximum rents established pursuant to said Acts which were received by the defendant, his agents or employees since the date maximum rents were established for said housing accommodations pursuant to said Acts; provided that refunds made by the defendant for and on

behalf of such persons in compliance with the direction of the Court for rents received within one year prior to the bringing of this action, shall be deducted from the amount of the judgment prayed for in the preceding Paragraph "A"; or, in the alternative, that the defendant be ordered and directed to pay the amount of the overcharge referred to in this Paragraph "B" to the United States of America, and

C. A preliminary and final injunction enjoining the defendant, his agents, servants, employees, and all persons in active concert or participation with him, from:

1. Directly or indirectly charging, demanding, accepting or receiving amounts in excess of the maximum rent established pursuant to the aforesaid Acts, and said Acts as hereafter amended or superseded and the regulations issued thereunder.

2. Directly or indirectly discontinuing, withholding, suspending or shutting off the supply of services, including utilities, heat, hot and cold [4] water, janitorial and maid service, furniture, furnishings, equipment, living space and all other services which the landlord is required to provide by said Acts and the regulations issued pursuant thereto, or threatening to do any of the foregoing with reference to the above-described housing accommodations or any other controlled housing accommodations owned, managed or controlled by defendant.

3. Engaging in any action or course of action

the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled or managed by the defendant, and from evicting said tenants in any form or manner contrary to said Housing and Rent Act of 1947, as amended, and regulations issued pursuant thereto as heretofore or hereafter amended or superseded.

4. Violating said Housing and Rent Act of 1947, as amended, and any of the regulations issued pursuant thereto, as heretofore or hereafter amended or superseded.

/s/ CHRISTIAN V. MURRAY,
Attorney, Office of the Housing Expediter.

Housing Accommodations located at 820-830 South Serrano Avenue, Los Angeles 5, California.

Unit	Name of Tenant	Period of Over-charge	Amount Paid	Legal Maximum Rent	Amount of Over-charge
820 $\frac{1}{4}$	Norman L. Rogers	1-7-45 to	\$80.00	\$70.00	\$397.50
		5-1-48	month	month	
		5-1-48 to	92.00	70.00	110.00
		9-1-48	month	month	
820 $\frac{1}{4}$	Viva C. Shea and	10-15-48 to	100.00	70.00	255.00
	Patricia O'Brien	6-30-49	month	month	
830	Maxine W. Woody	10-27-48 to	106.65	70.00	30.00
		12-1-48	for period	month	
		12-1-48 to	100.00	70.00	210.00
		6-1-49	month	month	

Total amount of overcharges.....\$1002.50

Statement referred to in paragraph V on page 2 of plaintiff's complaint.

[Endorsed]: Filed June 9, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
COMPLAINT

To Christian V. Murray, plaintiff's attorney, 1206
Santee St., Los Angeles 15, California:

Please Take Notice that the attached motion to dismiss the complaint will be brought on for hearing before this Court in Court Room No. 5, United States District Court, United States Post Office and Court House Building, Los Angeles, California, on Monday, August 8, 1949, at 10 a.m., or as soon thereafter as counsel can be heard.

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT

All defendants, except the Does, move the Court under Rule 12b, Federal Rules of Civil Procedure, to dismiss the complaint for:

1. Lack of jurisdiction over the subject matter;
2. Failure to join an indispensable party;
3. Failure to state a claim upon which relief can be granted.
4. Unconstitutionality of the Housing and Rent Act of 1949.

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

POINTS AND AUTHORITIES ON MOTION TO DISMISS

The Complaint

The United States acting as sovereign or proprietor or agent sues the defendants on contracts between landlords and tenants for the use of furnished apartments alleging that the consideration for such contracts is in part unlawful; that the tenants are entitled to a refund of overcharges; and that the United States is entitled to a penalty based on the amount of the overcharges.

I. Jurisdiction.

The complaint covers a period from January 7, 1945, to June 30, 1949, alleging overcharges to three tenants in two apartments of a total of \$1,002.50.

All of the overcharges in the years 1945, 1946, 1947 and part of 1948 are barred by the statute of limitations of one year in the Housing and Rent Act of 1949, Sec. 204, thereby reducing the amount here involved to approximately \$500.00. In stating this amount I wish to reserve the point that the United States had no right of action prior to April 1, 1949, and that the right of action was not retroactive. The United States, at most, has a right to recover a penalty on \$90.00 of overcharges.

The jurisdiction of this Court must be found in the Housing and Rent Act of 1949, and sections 1345, 1331 and 1332, Judicial Code or United States Code.

Section 205 of the Housing and Rent Act of 1949, amending Section 206 of the Housing and Rent Act of 1947, in referring to injunctive relief by the United States, provides:

“The United States may make application to any [9] Federal, State or Territorial court of competent jurisdiction for an order, etc.”

With this language of the law as expressed by Congress this Court, as a court of limited jurisdiction, must find its jurisdiction in the United States Code, sections 1331 or 1332. Applying either section the complaint fails for lack of the jurisdictional amount of \$3000.00. See *Fox v. 34 Hillside Realty Company*, 79 F. Supp. 832.

II. Indispensable party.

The tenant beneficiary of governmental patrimony is an indispensable party. Prior to April 1, 1949, the effective date of the Housing and Rent Act of 1949, the tenant alone had the right to sue for an overcharge under the Housing and Rent Act of 1947. The period covered by the complaint herein goes back to 1945, and the complaint is asserted under sections 205(c) of the Emergency Price Control Act of 1942, as amended, and section 206 of the Housing and Rent Act of 1947, as amended. See paragraph II, page 1, complaint. Incidentally, section 901 of the Emergency Price Control Act of 1942 declared its purpose to be “to prevent speculative, unwarranted, and abnormal increases in prices and rents.” See Title 50, USCA

War Appendix, section 901. There is no allegation in this complaint that the rents charged were speculative, unwarranted or abnormal. Section 203 of the Housing and Rent Act of 1947, 61 Stat. 197, terminated the establishment or maintenance of maximum rents under the authority of the Emergency Price Control Act of 1942, as amended, with respect to any housing accommodations, so the function of the Emergency Price Control Act of 1942 in the present case is a peg from which the blanket of war power is stretched up to now to attempt to provide a constitutional basis for all housing and rent acts subsequent to 1947. [10]

III. Improper complaint.

In addition to the weaknesses in the complaint pointed out in points I and II, the complaint is bad for the reason that it asserts a claim for a period prior to the enactment of the law giving the alleged right of action and in conflict with the rights given to tenants in the prior laws. The complaint ignores every statute of limitation in prior laws. The United States at most had no right to maintain this action prior to April 1, 1949, and there is nothing in the Housing and Rent Act of 1949 which makes its right to sue retroactive.

IV. The Housing and Rent Act of 1949 is unconstitutional.

Cases concerning the constitutionality of the Housing and Rent Act of 1949 are pending in the

United States District Courts for the Southern District of New York and the Northern District of Illinois.

The case in New York was heard by Circuit Judge Learned Hand and District Judges Leibell and Ryan on June 30, 1949, in civil action No. 50-156, entitled Federal Landlords Committee, Inc., et al v. Tighe E. Woods, etc. It was heard on a motion to dismiss by the Housing Expediter whose main contention was that the Court had no jurisdiction of him because of venue and that he could not be sued in that district since he was a resident of the District of Columbia. The complaint filed under the Federal Declaratory Judgments Act seeks to have the Housing and Rent Act of 1949 declared to be unconstitutional. Should the court hold it has jurisdiction then it may pass on the questions of constitutionality.

The case in Chicago was before Hon. Elwyn R. Shaw in the United States District Court, who, according to newspaper accounts, held the "local option" clause of the 1949 Act to be unconstitutional, and promised a ruling on the whole act's constitutionality. [11]

In addition to the grounds of unconstitutionality urged in these cases, and as a ground applying to the present complaint, where in the Constitution is there any authority for Congress to pass a law giving the United States the right in a civil action to sue one citizen for and on behalf of another citizen. Had there been any clause in the original

draft of the Constitution giving such a power it is fair to observe that the Constitution would never have been adopted. In all criminal laws under which the United States prosecutes there is no right of action by the United States for any civil redress to a citizen which may be based on the acts involved in the crime. The United States must show clear and convincing authority to do so before it can exercise such an excessive power.

Respectfully submitted,

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1949.

MINUTE ORDER OF AUGUST 8, 1949

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 8th day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing motion of defendants, filed July 25, 1949, to dismiss; R. G. Solof, Esq., appearing as counsel for plaintiff; Daniel Dougherty, Esq., appearing as counsel for defendants;

Court orders said motion to dismiss denied, and that defendants have twenty days to answer. [14]

In the United States District Court, Southern
District of California, Central Division

No. 9819-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MRS. GRACE HARTLEY EMERY, ROBERT
W. EMERY, DANIEL DOUGHERTY, P. S.
DOUGHERTY, Also Known as MRS. DAN-
IEL DOUGHERTY, DOES I to X,
Defendants.

MEMORANDUM DECISION

Appearances:

For the Plaintiff:

ABE I. LEVY,
CHRISTIAN V. MURRAY,
Los Angeles, California.

For the Defendant:

DANIEL DOUGHERTY,
Los Angeles, California. [15]

Yankwich, District Judge:

The action is for treble damages, restitution and injunction. The defendants have filed a motion to dismiss. They attack the validity of the Housing and Rent Act of 1947 as amended, and the right to institute the action.

I do not agree with the recent decision in the case of *Woods v. Shoreline Cooperative Apartments, Inc.*, decided July 13, 1949, by the District Court for the Eastern Division of Illinois, wherein the Housing and Rent Act of 1949 was held unconstitutional. The present Act follows the pattern of other Rent Acts. The war emergency still exists and the United States Supreme Court has held repeatedly that war powers may be exercised for a reasonable number of years after the actual "shooting war" ends, to take care of actual economic dislocations that follow each war. (*Fleming v. Mohawk, etc. Lbr. Co.*, 1947, 331 U. S. 111.)

In *Lewis v. Anderson, Secretary of Agriculture*, 72 Fed. Supp. 119, involving sugar controls, I held that administrative penalties could be imposed on retailers for violating sugar controls after the "shooting war" had ended. I used this language, which is as applicable today as on June 9, 1947:

"Wars have never actually terminated on the day "cease fire" orders were given. Many of them continued for decades, not so much in the form of actual fighting, but in the disruption and dislocation which they caused in the life of the nations involved. These facts, which are truisms to any student of history, apply especially to modern warfare as exemplified by the last war. [16] The destruction and the dislocation of the economic life of both the victor and the vanquished continued and will continue for years after the actual hostilities with Germany and Japan ended. And so those

who are in charge of regulating and controlling the economic life of the nations involved in the war have the difficult problem of determining when the various controls should come to an end. Wishful and unrealistic thinking call for immediate cessation of all governmental interference with economic life. Prudent statesmanship, economic or other, realizes the danger of immediate decontrol. The persons who are loudest in demanding the immediate return to free economy complain most vociferously about 'sudden decontrol.' Rightly. For economic life cannot stand 'sudden shock.' Adjustment from war to peacetime economy, if it is to be helpful, must be gradual.

"The failure to understand these fundamental economic principles is responsible for many of the contentions which are now made before the courts. Some litigants wish us to adopt the view that, regardless of what the Congress does, the actual cessation actually entitles businesses or activities under control to be relieved from it."

The United States Court of Appeals for the Ninth Circuit, on June 22, 1949, in the case of *Woods v. McCord*, 9 Cir., No. 12,039, decided on June 22, 1949, held that the various money recoveries, whether in the form of reimbursement or otherwise, are imposed for two purposes: (1) to make a landlord repay rent unlawfully exacted, and (2) to help enforce the law. This is a [17] complete answer to the contention made here that the Congress cannot authorize the Housing Expediter to collect sums under the jurisdictional mini-

mums of the United States District Court. Congress may choose the form in which it will enforce its own laws. As the Constitution does not limit the amount of the jurisdiction of the District Courts, the Congress may make jurisdiction independent of the amount involved. (Rent Act, secs. 205, 206. See *Creedon v. Randolph*, 5 Cir., 1948, 165 F(2) 918.)

On the question of delegation of legislative power, the case of *Carter v. Carter Coal Company*, 1936, 298 U. S. 238, has lost its force. When the Congress authorized cities to recommend decontrol after hearings, the delegation of power in that respect was no greater than that given to the advisory committees under the Agricultural Act, which many years ago I upheld in the case of *Redlands Foothill Groves v. Jacobs*, 1937, 30 Fed. Supp. 995. (This case was upheld by the upper courts.)

So the matters presented in this case are not new as far as this Court is concerned. I have ruled on similar matters in the past. If to this fact I add the obligation of lower courts to apply the resumption of constitutionality to acts of the Congress, it is evident that none of the points raised is meritorious, and I need not wait until the Supreme Court has acted on the matter.

The motion to dismiss is denied.

Dated this 12th day of August, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed Aug. 12, 1949. [18]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO FILE
A SECOND MOTION TO DISMISS.

To Christian V. Murray, plaintiff's attorney, 1206
Santee St., Los Angeles 15, California:

Please Take Notice that the attached motion for leave to file a second motion to dismiss the complaint will be brought on for hearing before this Court in Court Room No. 5, United States District Court, United States Post Office and Court House Building, Los Angeles, California, on Monday, September 12, 1949, at 10 a.m., or as soon thereafter as counsel can be heard.

/s/ DANIEL DOUGHERTY,
Attorney for Defendants. [19]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE A SECOND
MOTION TO DISMISS THE COMPLAINT

In the absence of the District Judge, and in view of the memorandum opinion by said District Judge filed herein on August 12, 1949, this motion is made on notice in writing instead of orally ex parte.

Said second motion to dismiss, if allowed to be filed, will be based on the following grounds:

(a) That Section 204 of the Housing and Rent Act of 1949, which purports to give the United States the right to sue a landlord for and on behalf of a tenant is unconstitutional.

(b) That if said section 204 is constitutional then the tenant is an indispensable party along with the United States to any suit.

(c) That the attorneys who have appeared herein representing the United States do not allege their authority to appear for the United States and have no authority to do so.

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

POINTS AND AUTHORITIES ON MOTION FOR LEAVE TO FILE A SECOND MO- TION TO DISMISS

Need for Motion

Paul O'Brien's Manual of Federal Appellate Procedure, 3d Ed., p. 7 states:

“The law requires that errors, to be reviewable, must have been definitely and timely called to the attention of the trial court, in order to afford that court a fair opportunity to pass upon the matter, and correct its own errors, if any. The purpose is to require counsel, at the proper time, to call the attention of the court to the claimed error with sufficient certainty and definiteness for the court to understand clearly the precise action of the court attacked or the precise action of the court which is sought to be obtained. Whether this has been done in a particular instance depends upon the actual situation in the trial at the time. If the reviewing court can see that the matter was so

raised in the trial as to present clearly to the mind of the trial court the same point that is urged on review, the ruling below is subject to review."

This court in its memorandum opinion does not mention the constitutionality of Section 204 of the Housing and Rent Act of 1949. Section 204 was new legislation and in a new field, namely, purporting to create a right for the United States to file a civil suit for and on behalf of one citizen against another citizen. Tenants are not wards of the Government like Indians, or seamen.

Defendants, as the target for the venting of the spleen of a departed, cantankerous tenant, who failed in his efforts to organize other tenants, wish to present two questions, which in interrogative form are: [21]

Is section 204 of the Housing and Rent Act of 1949 constitutional?

If it is constitutional is the tenant an indispensable party to any suit thereunder filed on the tenant's behalf?

The points raised in these questions were covered in points IV and II of the points and authorities filed in support of the original motion to dismiss. These questions are not answered in the memorandum opinion of the court as definitely and specifically as the admonition of Paul O'Brien's Manual requires. Therefore, these two questions are respectfully repeated here.

A New Ground to Dismiss

The attorneys for the United States do not show or allege their authority to appear for the United States. Seven individual attorneys are listed at the top of page one of the complaint as attorneys for the plaintiff, one of whom signed the complaint as attorney. There is no allegation of authority in the complaint.

Section 507, Part II, Title 28, United States Code, provides:

“Sec. 507. Duties; supervision by Attorney General.

“(a) It shall be the duty of each United States Attorney, within his district, to: (1) * * *; (2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned”;

(b) Provides for the supervision of litigation and its direction by the Attorney General.

Respectfully submitted,

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1949. [22]

MINUTE ORDER OF SEPT. 12, 1949

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 12th day of September, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing motion of defendants filed Aug. 29, 1949, for leave to file second motion to dismiss; A. Scheir, Esq., appearing as counsel for plaintiff; Daniel Dougherty, Esq., appearing as counsel for defendants; Court orders said motion denied and allows defendants 10 days to answer. [24]

[Title of District Court and Cause.]

ANSWER OF GRACE HARTLEY EMERY,
ROBERT W. EMERY, DANIEL DOUGH-
ERTY AND P. S. DOUGHERTY

First Defense

That the attorneys appearing for plaintiff in the complaint herein are not authorized to appear for the United States.

Second Defense

That Section 204 of the Housing and Rent Act of 1949 is unconstitutional.

Third Defense

That Section 204 of the Housing and Rent Act of 1949 became effective April 1, 1949, and has no retroactive effect.

Fourth Defense

That the tenant beneficiaries of this action, namely, Norman L. Rogers, Patricia O'Brien, Viva C. Shea, and Maxine W. Woody are indispensable parties to the action.

Fifth Defense

That the complaint herein fails to state a claim against defendants upon which relief can be granted. [25]

Sixth Defense

That the complaint herein states a cause of action for the collection of a penalty.

Seventh Defense

That the United States has no right of action for restitution herein.

Eighth Defense

That the United States is not now engaged in war.

Wherefore, defendants pray that the complaint herein be dismissed.

/s/ DANIEL DOUGHERTY,

In Pro Per and as Attorney for Defendants, Grace Hartley Emery, Robert W. Emery and P. S. Dougherty.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 23, 1949. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR
JUDGMENT ON THE PLEADINGS

To: Daniel Dougherty, in propria persona and as attorney for defendants Grace Hartley Emery, Robert W. Emery, and P. S. Dougherty, also known as Mrs. Daniel Dougherty, 820 So. Serrano Avenue, Los Angeles 5, California:

Please Take Notice, that pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, plaintiff will move the Court in the Court Room of Honorable Leon R. Yankwich in the United States Post Office and Court House Building at 312 North Spring Street, Los Angeles, California, on December 19, 1949, at 10:00 a.m. or as soon thereafter as counsel can be heard:

1. For Judgment on the pleadings in plaintiff's favor for the relief demanded in the Complaint on the following grounds:

(a) Plaintiff filed a Complaint for Treble Damages, Restitution [28] and Injunction on June 9, 1949;

(b) Defendant Daniel Dougherty, appearing for himself and as counsel for defendants Grace Hartley Emery, Robert W. Emery, and P. S. Dougherty, also known as Mrs. Daniel Dougherty, filed a Motion to Dismiss the Complaint;

(c) Plaintiff on July 29, 1949, filed its Reasons and Points and Authorities in Opposition to defendants' Motion to Dismiss;

(d) Defendants' Motion to Dismiss was heard by this Court and denied on August 8, 1949. Defendants were granted twenty (20) days after August 8, 1949, to file their Answer;

(e) Defendants, on August 29, 1949, filed their Motion for Leave to File a Second Motion to Dismiss the Complaint;

(f) Plaintiff on September 7, 1949, filed its Reasons and Points and Authorities in Opposition to defendants' Motion for Leave to File a Second Motion to Dismiss;

(g) Defendants' Motion for Leave, etc., was heard by this Court and denied on September 12, 1949;

(h) Defendants' Answer to the Complaint was filed and served on the plaintiff by mail on September 22, 1949;

(i) The Complaint and the Answer of defendants show that there is no material issue of fact, and that the plaintiff is entitled to judgment against

the defendants, Grace Hartley Emery, Robert W. Emery, Daniel Dougherty, P. S. Dougherty, also known as Mrs. Daniel Dougherty, as a matter of law.

This Motion is based on the pleadings and papers filed herein:

(a) Plaintiff's Complaint for Treble Damages, Restitution and Injunction;

(b) Defendants' Motion to Dismiss and the ruling of this Court thereon;

(c) The defendants' Answer; [29]

(d) Plaintiff's Points and Authorities filed herewith;

Dated: This 30th day of November, 1949.

ABE I. LEVY,

By /s/ EVELYN ST. JOHN,

Attorney for Plaintiff. [30]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

1. The Answer of defendants Grace Hartley Emery, Robert W. Emery, Daniel Dougherty, and P. S. Dougherty, also known as Mrs. Daniel Dougherty, raises no material issue of fact; therefore, a

motion for judgment on the pleadings is proper.

Rule 12(c), Federal Rules of Civil Procedure.

Rosenhan v. U. S. 131 F (2) 932.

Geist v. Prudential Ins. Co., 35 F. Supp., 790.

Ulen Contracting Corp. v. Tri-County Electric Corp., (D.C. Mich.) 1 F.R.D. 284.

2. The affirmative defenses set forth in defendants' Answer are denied. Plaintiff will treat the said defenses *seriatim*;

a.

Defendants' first defense is without merit. Attorneys appointed by the Housing Expediter are authorized to appear for the United States in civil cases arising under the Housing and Rent Act of 1947, as amended.

Delegation of Authority, September 24, 1949, (published in Federal Register October 6, 1949).

b.

As to the defendants' second defense, the question of constitutionality was raised by these defendants and decided by this Court in its Memorandum Decision filed August 12, 1949.

c.

Defendants' third defense is without merit. The 1949 amendment to the Housing and Rent Act of 1947 has retroactive application.

Bowles v. Hastings, 146 F (2) 94.

Bowles v. Strickland, 151 F (2) 419.

Martini v. Porter, (CCA 9) 157 F (2) 35;
(certiorari denied 330 U. S. 848).

d.

Defendants' fourth defense is without merit. The tenant is not an indispensable party to the action.

Creedon v. Randolph, 165 F (2) 918.

Woods v. McCord, 175 F (2) 919.

e.

Defendants' fifth defense, namely: that the Complaint failed to state a claim upon which relief can be granted, does not plead with particularity wherein the alleged defect consists. Consequently the plaintiff has not sufficient notice to enable it to meet the defendants' charge. For that reason plaintiff urges this Court to disregard defendants' fifth defense.

f.

The defendants' sixth defense, even if true, is not pertinent to this action. However, plaintiff does not concede that this is an action that is penal in nature; it is a civil action remedial in nature.

Kessler v. Fleming, (CCA 9) 163 F (2) 464.

U. S. v. Grannis, 172 F (2) 507; (certiorari denied May 31, 1949). [32]

g.

The defendants' seventh defense is without merit, as the plaintiff clearly has a right of action for restitution.

Creedon v. Randolph, (supra).

Woods v. Richman, 174 F (2) 614.

Woods v. McCord, (supra).

h.

The defendants' eighth defense is without merit. Cessation of hostilities and termination of a state of war are not synonymous terms.

Ex parte Milligan, 4 Wall 2; 18 L. Ed. 281.

U. S. v. Anderson, 9 Wall 56.

Stewart v. Kahn, 11 Wall 493.

Hamilton v. Kentucky Distilleries, 251 U. S. 146.

Fleming v. Mohawk Co., 331 U. S. 111.

Woods v. Cobleigh, 75 F. Supp. 594; (affirmed in 172 F (2) 167).

Respectfully submitted, this 30th day of November, 1949.

ABE I. LEVY,

By /s/ EVELYN ST. JOHN,

Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 30, 1949.

[Title of District Court and Cause.]

OPPOSITION TO MOTION OF HOUSING EX-
PEDITER FOR SUMMARY JUDGMENT

To Hon. Leon R. Yankwich,
U. S. District Judge:

This case is on your Honor's calendar for January 9, 1950, for setting for trial.

I. All material facts are put in issue by defendants' appearance, prayer for dismissal, and answer.

Your Honor has often stated from the bench that the Court of Appeals for this Circuit does not favor summary judgments. See, also, *Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co.* (1945), 61 F. Supp. 62, holding that it is the policy of courts to dispose of law suits on their merits whenever possible rather than on motions for summary judgment or judgment on the pleadings.

Here defendants have appeared and answered. They have prayed for dismissal of the complaint.

Prayer C of plaintiff's complaint (which is about one-half prayer), seeks a preliminary and final injunction against [34] defendants which would be effective until July 1, 1950, or, perhaps, longer.

Since injunctions are prospective and deal with the future, and are based on the facts as they appear at the time of trial, every material fact is put in issue by the appearance of the defendants and their prayer for dismissal without more. The

Housing Expediter is asking this Court to enjoin defendants without a verified complaint, without an affidavit of any kind, without a deposition of any kind, and without a material fact being established by proof of any kind. Paragraph VI of the complaint contains allegations on which the injunction must be based which amount to no more than an opinion of the Housing Expediter.

Courts should be slow to grant summary judgment against defendant in a case where injunctive relief is sought. *Lipson v. Interstate Home Equipment Co.*, D.C. Pa. 1944, 57 F. Supp. 955.

Your Honor has left too brilliant a trail of knowledge of the law of injunction in the pages of the Federal Supplement to require defendants to do more than cite your Honor's opinions, beginning with the consecutively printed opinions in 30 Federal Supplement of *Northrop Corporation v. Madden and Redlands Foothill Groves v. Jacobs, et al.*, at pages 993 and 995, respectively, and dated August 18, 1937, and January 5, 1940. The trail also goes through *Acret v. Hammond*, 41 F. Supp. 492, on October 25, 1941; through *Troy Laundry Co. v. Lockwood*, 63 F. Supp. 384, on September 18, 1945; to *Skelly v. Dockweiler*, 75 F. Supp. 11, on December 5, 1947. There may be other opinions which I have missed because of the admonition of my physician to take things easy. However, *Redlands Foothill Groves v. Jacobs* is, no doubt, the most comprehensive.

II. Restitution.

Can any one tell from the complaint to whom and how [35] much restitution is to be made? Defendants did not take anything from the plaintiff, so how can they be required to restore anything to it? As to plaintiff it is an action for a penalty, and as to plaintiff's wards, the tenants, it may be restitution. Evidence is required to separate these amounts.

III. Treble damages.

Even if defendants had defaulted your Honor would require evidence on which to base a judgment.

IV. Defendants may be allowed to amend their answer.

This case is, I assume, subject to Rule 16, F. R. C. P. (pre-trial) under which the Court may allow necessary or desirable amendments to the pleadings. Two of the three tenancies concerned in this case have been terminated by acts of the tenants, one since defendants' answer was filed, and the third may be terminated before trial herein.

V. Attorneys for plaintiff have no right to appear.

Section 507 of Chapter 31, Part II, Title 28, United States Code, effective September 1, 1948, makes it the duty of each United States Attorney, within his district, to:

“(2) Prosecute or defend, for the government,

all civil actions, suits or proceedings in which the United States is concerned”;

Nowhere in Chapter 31, *supra*, is authority given the Attorney General to supplant the United States Attorney. The Attorney General has authority to supervise, direct, and appoint assistants to the United States Attorney.

It is respectfully submitted that the Acting Attorney General, Hon. Peyton Ford, on September 24, 1949, had no authority to delegate to attorneys for the Housing Expediter even though he limited his attempted delegation so that such attorneys may not appear in the Supreme Court of the United States.

/s/ DANIEL DOUGHERTY,
Attorney for Named
Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 16, 1949. [36]

MINUTE ORDER OF DEC. 19, 1949

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of December in the

year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

For hearing motion of plaintiff, filed Nov. 30, 1949, for judgment on the pleadings; R. G. Solof, Esq., appearing as counsel for plaintiff; Daniel Dougherty, Esq., appearing as counsel for defendants;

Attorney Solof waives plaintiff's request for injunction.

Court orders motion of plaintiff granted for \$1,002.50 recovery, to be paid to tenants when received; and that no injunction issue. [38]

In the United States District Court, Southern
District of California, Central Division

No. 9819-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MRS. GRACE HARTLEY EMERY, ROBERT
W. EMERY, DANIEL DOUGHERTY, P. S.
DOUGHERTY, Also Known as MRS. DAN-
IEL DOUGHERTY, DOES I to X,

Defendants.

JUDGMENT

Plaintiff having filed its complaint for treble damages, restitution and injunction and defendants

Mrs. Grace Hartley Emery, Robert W. Emery, Daniel Dougherty and P. S. Dougherty, also known as Mrs. Daniel Dougherty, having filed a motion to dismiss said complaint, and the Court having denied said motion on August 8, 1949, and said defendants having filed a motion for leave to file a second motion to dismiss said complaint and the Court having denied said motion on September 12, 1949, and said defendants having filed their answer to said complaint, and plaintiff having filed its motion for judgment on the pleadings, and the matter having come on for hearing on said motion for judgment on the pleadings on December 19, 1949, before the Honorable Leon R. Yankwich, Judge, and the plaintiff at said hearing having waived its request for an injunction, and the plaintiff being represented by Richard G. Solof, Esq., and said defendants being represented by Daniel Dougherty, [39] Esq., one of the defendants herein, and the Court having heard arguments of counsel for plaintiff and said defendants, and the Court being fully advised in the premises, and it appearing to the Court that the defenses set forth in said defendants' answer do not constitute valid defenses to the allegations set forth in plaintiff's complaint, and it further appearing to the Court that plaintiff is entitled to judgment in its favor on the undisputed facts appearing in the pleadings, Now, Therefore, It Is Ordered, Adjudged and Decreed, that:

1. Judgment on the pleadings shall be and it is hereby entered herein in favor of the plaintiff and against the defendants Mrs. Grace Hartley Emery, Daniel Dougherty and P. S. Dougherty, also known as Mrs. Daniel Dougherty, in the sum of One Thousand, Two Dollars and Fifty Cents (\$1,002.50), and that same be paid at the Office of the Housing Expediter, Litigation Section, 1206 Santee Street, Los Angeles, California, in the form of a bank draft, cashier's check or certified check, or postal money order, made payable to the Treasurer of the United States.

2. Upon payment of the sum referred to in Paragraph 1 above, same shall be disbursed by plaintiff to the following tenants in the following amounts:

Norman L. Rogers.....	\$507.50
Viva C. Shea and Patricia O'Brien	255.00
Maxine W. Woody.....	240.00

3. In the event plaintiff should be unable to locate any of the tenants named in Paragraph 2 above, the amount to which said tenant or tenants are entitled shall be retained by the Treasurer of the United States.

4. Costs shall be assessed against the defendants Mrs. Grace Hartley Emery, Robert W. Emery, Daniel Dougherty and P. S. Dougherty, also known as Mrs. Daniel Dougherty, to be taxed by the Clerk in favor of the plaintiff in the sum of \$43.72.

5. The second cause of action set forth in plaintiff's complaint shall be and it is hereby dismissed. [40]

6. The above-entitled action shall be and it is hereby dismissed as to defendants Does I to X.

Dated: Los Angeles, California, this 21st day of December, 1949.

/s/ LEON R. YANKWICH,
U. S. District Court Judge.

Approved As To Form,
this day of December, 1949.

DANIEL DOUGHERTY,
Appearing in Propria Persona, and Attorney for
Defendants, Mrs. Grace Hartley Emery, Robert W. Emery and P. S. Dougherty, Also
Known as Mrs. Daniel Dougherty.

Presented this 20th day of December, 1949,
By /s/ RICHARD G. SOLOF,
One of the Attorneys
for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed and entered Dec. 21, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO
ALTER OR AMEND JUDGMENT

To Christian V. Murray, Esq., Attorney for Plaintiff:

Please Take Notice that, pursuant to Rule 59 of the Federal Rules of Civil Procedure, defendants will move the Court in Court Room No. 7, United States District Court, Los Angeles, California, on Monday, January 16, 1950, at 10 a.m., or as soon thereafter as counsel can be heard, to alter or amend the judgment entered herein on December 21, 1949, recorded in Judgment Book 62, page 640, on the following grounds:

1. The form of the judgment is in violation of Rule 54 (a) Federal Rules of Civil Procedure.

2. The judgment does not show a compliance with the proviso of Section 204 of the Housing and Rent Act of 1949.

3. The judgment should be made payable at the office of the Clerk of this Court and not at the office of the Housing Expediter where no public record of payment or satisfaction of judgments is required by law.

4. The judgment does not provide the length of time or [43] amount of effort to be made by plaintiff in locating the four individuals to whom payment is to be made, or the form of evidence of such payment to be given by such individuals.

Dated, Los Angeles, California, December 31, 1949.

/s/ DANIEL DOUGHERTY,

Attorney for All Defendants
Except Does.

POINTS AND AUTHORITIES OF MOTION TO ALTER OR AMEND JUDGMENT

1. The form of the judgment is in violation of Rule 54 (a) Federal Rules of Civil Procedure.

This rule reads in part—

“A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.”

Lines 20, 21, 22, 23, 24, 25, 26, 27, and line 28 to and including the word “and” on page one should be stricken from the judgment.

2. The judgment does not show a compliance with the proviso of Section 204 of the Housing and Rent Act of 1949.

This section provides:

“That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period.”

There was no allegation in the complaint, nor is there any recital in the judgment, respecting the

failure or disqualification of the tenants to institute an action.

3. The judgment should be made payable at the office of the Clerk of this Court and not at the office of the Housing Expediter where no public record of payment or satisfaction of judgment is required by law.

Where will there be a public record of payment or satisfaction of the judgment showing the removal of its lien? [45]

4. The judgment does not provide the length of time or amount of effort to be made by plaintiff in locating the four individuals to whom payment is to be made, or the form of evidence of such payment to be given by such individuals.

The judgment could have required the defendants to pay the tenants, the real parties in interest herein, and file evidence of such payment with the Clerk of this Court within a reasonable time.

In any event there can be no forfeiture of the moneys due the tenants, the real but not appearing parties in interest herein, without express authority of law.

Respectfully submitted,

/s/ DANIEL DOUGHERTY,
Attorney for Named
Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 31, 1940. [46]

MINUTE ORDER OF JAN. 16, 1950

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 16th day of January in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing motion of defendants filed Dec. 31, 1949, to alter or amend judgment; R. G. Solof, Esq., appearing as counsel for plaintiff; Daniel Dougherty, Esq., appearing as counsel for defendants; Attorney Dougherty argues in support of said motion.

Court orders said motion denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that Grace Hartley Emery, Robert W. Emery, Daniel Dougherty, P. S. Dougherty, also known as Mrs. Daniel Dougherty, hereby appeal to the Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on December 21, 1949.

/s/ DANIEL DOUGHERTY,
Attorney for Appellants, Grace Hartley Emery,
Robert W. Emery, Daniel Dougherty, and P. S.
Dougherty, Also Known as Mrs. Daniel Dough-
erty.

[Endorsed]: Filed Mar. 15, 1950. [49]

In the United States District Court, Southern
District of California, Central Division

No. 9819 Y

UNITED STATES OF AMERICA,
Plaintiff,
vs.

GRACE HARTLEY EMERY, et al.,
Defendants.

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

- I. Appellants designate the complete record.
- II. Under Rule 75(g) F.R.C.P., appellants suggest the complete record, in chronological order, consists of:
 1. Complaint.
 2. Motion to dismiss complaint.
 3. Order denying motion to dismiss.

4. Opinion of District Judge.
5. Motion for leave to file a second motion to dismiss.
6. Order denying motion for leave.
7. Answer.
8. Motion for summary judgment.
9. Opposition to motion for summary judgment.
10. Judgment.
11. Motion to alter or amend judgment.
12. Order denying motion to alter or amend.
13. Notice of Appeal. [50]
14. Designation of Contents of Record on Appeal.

DANIEL DOUGHERTY,
Attorney for Appellants.

State of California,
County of Los Angeles—ss:

Henry B. Donath being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 553 S. Western Ave., Los Angeles, Calif., that on the 20th day of March, 1950, affiant served the within designation of contents of record on appeal on the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said plaintiff, Richard G. Solof, Esq., Litigation Attorney, 1206 Santee St., Los Angeles 15, Calif., and by then sealing said envelope and depositing the same, with postage

thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the persons by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and/or there is a regular communication by mail between the place of mailing and the place so addressed.

HENRY B. DONATH.

Subscribed and sworn to before me this 20th day of March, 1950.

BEULAH E. DONATH,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires November 16, 1950. [52]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 52, inclusive, contain the original Complaint for Treble Damages, Restitution and Injunction; Notice of and Motion to Dismiss Complaint; Memorandum Decision; Notice of and Motion for Leave to File a Second Motion to Dismiss; Answer of Grace Hartley Emery et al; Notice of and Motion for Judgment on the Pleadings; Op-

position to Motion of Housing Expediter for Summary Judgment; Judgment; Notice of and Motion to Alter or Amend Judgment; Notice of Appeal and Designation of Contents of Record on Appeal and full, and correct copies of Minute Orders Entered August 8, 1949; September 12, 1949; December 19, 1949, and January 16, 1950, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 12th day of April, A.D., 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12522. United States Court of Appeals for the Ninth Circuit. Grace Hartley Emery, Robert W. Emery, Daniel Dougherty and P. S. Dougherty, also known as Mrs. Daniel Dougherty, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 14, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12522

GRACE HARTLEY EMERY, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' DESIGNATION OF RECORD
AND STATEMENT OF POINTS

Designation of Record

Appellants designate the complete record for printing.

Statement of Points

1. That Section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is unconstitutional.

2. That if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945.

3. That the four tenant beneficiaries who occupied two rental units were indispensable parties plaintiff.

4. That the trial court erred in granting summary judgment against appellants.

5. That the trial court erred in denying appellants' motion to alter or amend the judgment under review.

6. That the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money.

7. That the United States Attorney under Section 507 of the United States Code Judiciary and Judicial Procedure was required to appear for plaintiff.

/s/ DANIEL DOUGHERTY,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 24, 1950.

No. 12522

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE HARTLEY EMERY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

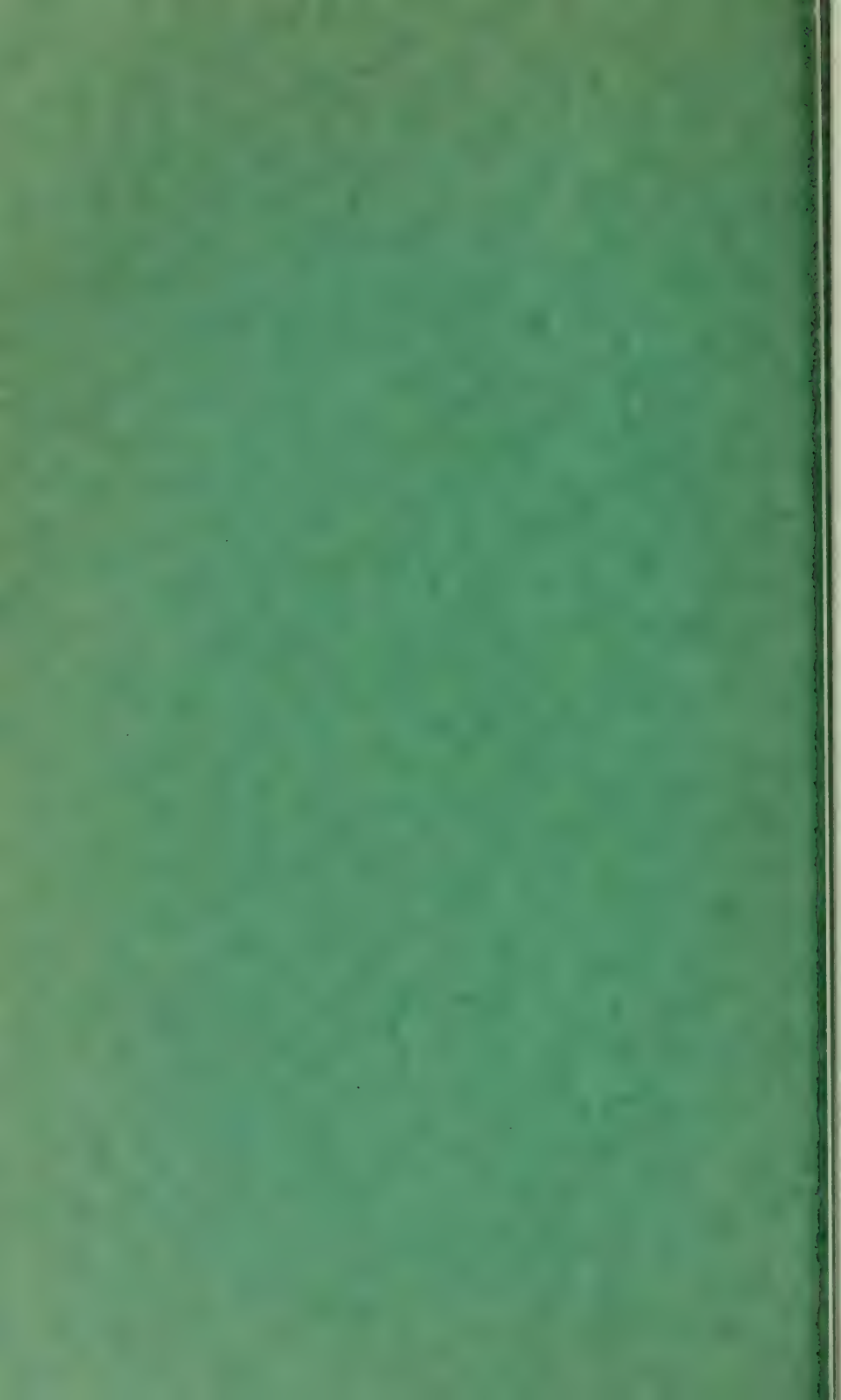
Appellee.

BRIEF FOR APPELLANTS.

DANIEL DOUGHERTY,

820 South Serrano Avenue, Los Angeles 5,

Attorney for Appellants.



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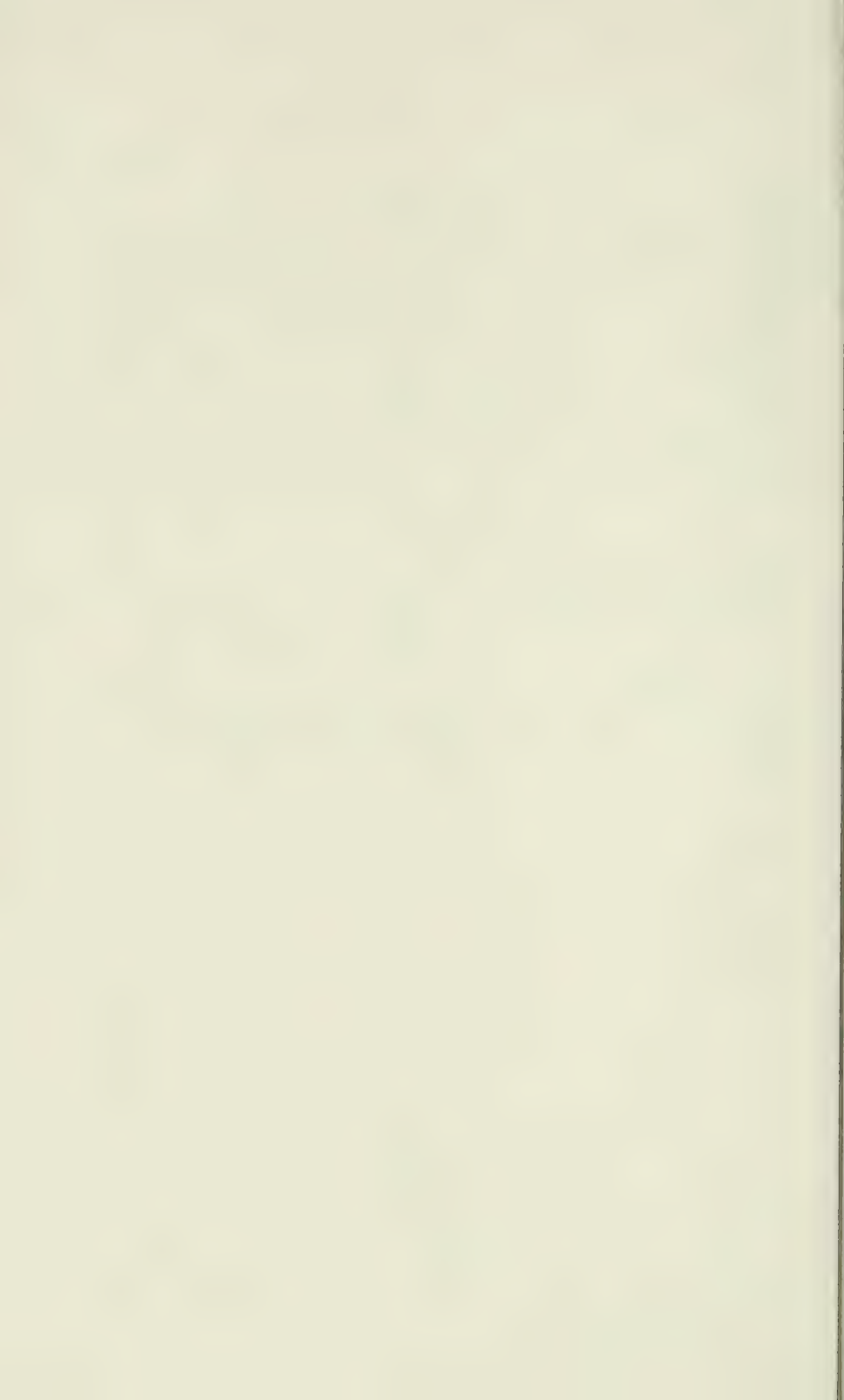
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No. 12522

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

GRACE HARTLEY EMERY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

Jurisdiction.

Appeal from final decision [R. 34-37] of the United States District Court for the Southern District of California, Central Division, Hon. Leon R. Yankwich, District Judge.

This Court has jurisdiction of this appeal under Sections 1291 and 41, Title 28, United States Code, and Rule 73 (a) Federal Rules of Civil Procedure.

The District Court had jurisdiction according to the allegations of the complaint [R. 2-6] under:

Housing and Rent Act of 1949, 63 Stat. 21 (referred to in complaint [R. 2, Para. I] as Public Law 31, 81st Con-

gress, 1st Session.) The provisions of this Act pertinent to this appeal are printed in an appendix to this brief.

Housing and Rent Act of 1947, 61 Stat. 197, as amended.

Emergency Price Control Act of 1942, 56 Stat. 23, as amended.

U. S. District Judge Rodney has summarized the laws relating to rent control in his article entitled "History of Rent Control Laws with respect to Damages allowable thereunder" published in 9 Federal Rules Decisions, p. 501, the issue for February, 1950.

Statement.

Complaint filed June 9, 1949 [R. 6] was for treble damages, restitution and injunction. [R. 2.] The complaint did not state two separate causes of action by clearly naming them as first and second. The judgment [R. 37] dismissed the second cause of action. No injunction was issued. Treble damages were not mentioned in the judgment. [R. 34-37.] The judgment is for restitution of \$1002.50 to four tenants of two units for alleged overcharges for housing accommodations [R. 36] and \$43.72 costs.

The alleged overcharges for unit 820¼ [R. 6] were to tenant Norman L. Rogers, for the period January 7, 1945, to September 1, 1948, nearly three and two-thirds years, amounting to \$507.50;

For unit 820 $\frac{1}{4}$ [R. 6] were to tenants Viva C. Shea and Patricia O'Brien for the period October 15, 1948 to June 30, 1949, amounting to \$255.00;

And for unit 830 [R. 6] was to tenant Maxine W. Woody for the period October 27, 1948 to June 1, 1949, amounting to \$240.00.

The judgment [R. 36] does not divide the \$255.00 between tenants Shea and O'Brien.

Appellants as defendants moved to dismiss the complaint under Rule 12b, F. R. C. P. [R. 7]. The motion to dismiss was denied. [R. 13]. An opinion of the District Judge [R. 14-17] was rendered. See *United States v. Emery*, 85 F. Supp. 354. A motion for leave to file a second motion to dismiss [R. 18-21] was filed. This motion was denied. [R. 22.] Answer stating eight separate defenses [R. 22-24] was filed. Appellee as plaintiff filed its motion for judgment on the pleadings. [R. 24-29.] Opposition to this motion for summary judgment [R. 30-33] was filed. At the hearing on motion for judgment on the pleadings [R. 33] on December 19, 1949, plaintiff withdrew its prayer for an injunction and made no mention of treble damages [R. 34]. The Court granted motion of plaintiff for \$1002.50 recovery to be paid to tenants when received, and made no mention of treble damages. Judgment was filed and entered for \$1002.50 and \$43.72 costs on December 21, 1949 [R. 34-37]. A motion to alter or amend the judgment was made [R. 38-40]. This motion was denied [R. 41]. Notice of appeal from the judgment was filed [R. 41-42]. The complete record designated on appeal has been printed.

Errors Relied on.

The Statements of Points [R. 46-47] contains seven items:

1. That Section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is unconstitutional.

2. That if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945.

3. That the four tenant beneficiaries who occupied two rental units were indispensable parties plaintiff.

4. The trial court erred in granting summary judgment against appellants.

5. That the trial court erred in denying appellants' motion to alter or amend the judgment under review.

6. That the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money.

7. That the United States Attorney under Section 507 of the United States Code Judiciary and Judicial Procedure was required to appear for plaintiff.

Argument.

I.

Sec. 204 of the Housing and Rent Act of 1949, 63 Stat. 21, became effective April 1, 1949. See Judge Rodney's History of Rent Control Laws, 9 F. R. D. 501. This section purports to give the United States a right of action. Sec. 204 specifically states that the United States does not have a right of action for thirty days after a violation has occurred. The thirty day period is provided for the tenant to file an action of his own or show his lack of right to bring the action. Therefore, no right of action for the United States existed initially until May 1, 1949. *Woods v. Miller*, 333 U. S. 138, upholding the constitutionality of the Housing and Rent Act of 1947 was decided February 16, 1948, more than one year before the passage of Sec. 204 of the 1949 Act. The 1949 amendment not being in existence it could not have been sustained by the Supreme Court in *Woods v. Miller*. *United States v. Shoreline Cooperative Apartments*, 338 U. S. 897, decided December 12, 1949, reversing 84 Fed. Supp. 660, *per curiam* on the authority of *Woods v. Miller*, did not pass on the point appellants raise here. So the question of constitutionality of the right of the United States to sue civilly one citizen (landlord) for and on behalf of another (tenant) is undetermined by the Supreme Court. Such bold action by the Government has not heretofore been attempted.

Art. 1, sec. 8, clause 11, of the Constitution gives Congress the power "to declare war." Under this power the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, was passed. Its purpose was declared to be "to prevent speculative, unwarranted and abnormal increases in prices and rents."

On March 30, 1949, when Congress passed Sec. 204 of the 1949 Act, we were in the waning days of the wars with Germany and Japan. The President had declared hostilities at an end on December 31, 1946, at noon.

Mr. Justice Jackson in his concurring opinion in *Woods v. Miller, supra*, indicated that there is a limit to the upholding of laws passed under the war power. That limit has been reached here. This law takes liberty from the citizen contrary to the very fundamentals of the Constitution.

II.

The Supreme Court of the United States in *Claridge Apartments Co. v. Commissioner*, 323 U. S. 141, 164, decided December 4, 1944, said:

“Retroactivity, even when permissible, is not favored except upon the clearest mandate.”

In *Hassett v. Welch*, 303 U. S. 303, 314, decided February 28, 1938, the Supreme Court said:

“In view of other settled rules of statutory construction which teach that a law is presumed, in the absence of a clear expression to the contrary, to operate prospectively * * *” citing *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, 162. See, also, U. S. Supreme Court Digest, annotated, Statutes, Prospective or Retrospective Operation, Secs. 208, 209.

Three United States District Courts have held that the Housing and Rent Act of 1949 has no retroactive effect. See *United States v. Mashburn*, 85 Fed. Supp. 968, decided September 29, 1949; *United States v. Bize*, 86 Fed. Supp. 939, decided September 2, 1949; and *United States v. Gianoulis*, 86 Fed. Supp. 933, decided August 4, 1949.

The opinion in the *Gianoulis* case is by Judge Rodney, the author of the History of Rent Control Laws, *supra*. In his opinion he said:

“The foregoing history of rent control enactments indicates to me that the Housing and Rent Act of 1949 must apply only prospectively and not retrospectively. Indeed, I would reach such a conclusion from a construction of the language of the 1949 Act itself, without resort to prior enactments.”

In *United States v. Bize*, 86 Fed. Supp. 939, Judge Delehant said:

“In summary, the court is satisfied that the amendment of 1949 might with full constitutional validity have been given a retroactive effect. The real question in that connection is whether it was thus framed. And the Court, at this time, is of the opinion that it was not.”

And further, Judge Delehant said:

“A familiar rule of statutory construction, which need not be too insistently labored here, declares that unless the contrary fairly appears by express declaration or necessary implication from the language of a statute, it will be presumed and considered to have only a prospective, and not a retroactive operation (citing cases).” “The presumption is clearly against retroactivity. And it is particularly strong when an antecedent operation would visit a therefore non-existent harshness upon any person or group of persons. Nowhere in the section of the statute under review is there any language declaring its retrospective operation. And nothing in the Act of 1949, necessarily or even reasonably, implies such operation. Its purpose is equally, and it may well be argued better, served by an entirely prospective application.”

In *United States v. Mashburn*, 85 Fed. Supp. 968, Judge Miller said:

“The law making branch of the government is aware of the generally accepted canons of statutory construction, and in the absence of an expression of intention to the contrary, the Court feels compelled to conclude that Congress intended a prospective effect only.”

The complaint herein [R. 2-6] filed June 9, 1949, began with alleged overcharges from January 7, 1945 (tenant Rogers) and ended with June 30, 1949 (tenants Shea and O'Brien). As to tenant Rogers the complaint is wholly retroactive. As to tenants Shea, O'Brien and Woody the complaint is retroactive and prospective, too. The complaint in these instances has ignored the thirty day period provided for tenant action and actually sued for a period not yet expired in one case and for a period which had expired only eight days prior to the complaint in another.

The complaint, if it in fact has two causes of action as the judgment indicates [R. 37], is subject to the construction in its paragraph I [R. 2] that its first count is for restitution under Sec. 205(a) of the Emergency Price Control Act, as amended, and its second count is for injunction, restitution and treble damages under sections 205 and 206 of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1949. Sec. 205(a) of the 1942 Act covers injunctive relief only. So the denial of an injunction removed from this case any relief under the 1942 Act. In the many laws relating to rent control

there are two basic ones, the 1942 Act and the 1947 Act. The 1947 Act superseded the 1942 Act *in toto*. The 1947 Act, effective July 1, 1947, as the complaint itself alleges in paragraph III [R. 3] superseded the 1942 Act. The 1947 Act provided in Sec. 203(a)

“(a) After the effective date of this title, no maximum rents shall be established or maintained under the authority of the Emergency Price Control Act of 1942, as amended, with respect to any housing accommodations.” See Judge Rodney’s History of Rent Control Laws, *supra*.

This section surely means that there can be no further causes of action under the 1942 Act, and makes a certain deadline of July 1, 1947, the effective date of the Act. The 1947 Act established a new and complete code of rent control as of its effective date. The 1947 Act did not give the United States a right of action against landlords. Neither did the 1948 Act. It was not until April 1, 1949, that that provision came into the law. In the way in which it was introduced (not to give a right of action to the United States until after the tenant had thirty days to act or show his disqualification to act) it can be said to be prospective only.

Under State law in California the retroactivity of laws is prohibited by statute. See Sec. 3 of the Civil, Civil Procedure and Penal Codes of California, which read the same—“no part of it is retroactive, unless expressly so declared.”

III.

Sec. 367 of the Code Civ. Proc. of California requires:

“Every action must be prosecuted in the name of the real party in interest, except * * *” (the exceptions are executor, administrator, trustee, or other representative.)

While this section is not controlling on this Court the principle it declares is a sound one.

From the judgment here it clearly appears that four tenants named therein are the real parties in interest. They each had causes of action which did not expire for one year after an alleged violation. They did nothing themselves. They waited for the windfall of Government assistance—no court costs, no attorneys’ fees! Had they been parties they might have obtained restitution for the period preceding April 1, 1949. The United States, without right of action until May 1, 1949, could not recover on the tenants behalf for any overcharges before April 1, 1949. The United States had no right of action for tenants Rogers, Shea and O’Brien, or Woody. These tenants did not lose their rights to sue by the passage of the 1949 Act, but they have since lost their rights by not acting as free American citizens in attempting to assert any such rights themselves.

IV.

It was unfair to appellants to allow the plaintiff to amend its complaint at the hearing on the motion for judgment on the pleadings on December 19, 1949 [R. 33]. Plaintiff made two amendments, one express and one implied. Plaintiff withdrew its prayer for injunction, on which appellants were clearly entitled to a hearing, which was an express amendment. Plaintiff was silent about

treble damages, which was an implied amendment. There was no oral evidence to support the allegations of the complaint. There had been no request for admissions under Rule 36, F. R. C. P. The complaint was not verified. There were no affidavits. The appellants answer contained a Fifth defense "that the complaint herein fails to state a claim against defendants upon which relief can be granted." Rule 12(d) F. R. C. P. indicates that this defense raises issues of fact as well as law, otherwise it would not authorize the trial judge to continue any hearing until the trial upon the merits. Plaintiff had possession of the original registrations of the two units made on Form DD 6-D, showing the maximum rents on March 1, 1942, and, also, of any papers authorizing a 15% increase under the 1946 Act. Plaintiff was also required to show the amounts claimed to have been paid by Shea and O'Brien. The complaint did not divide this amount.

The complaint shows on its face that plaintiff did not comply with Sec. 204 of the 1949 Act. The complaint shows that plaintiff had no cause of action as to tenants Shea, O'Brien and Woody. The complaint was filed June 9, 1949, covering in the case of Shea and O'Brien, not a period which expired thirty days before June 9th, but actually for a period in advance of that date—to June 30, 1949. On the face of the complaint the plaintiff had no right of action until July 30, 1949. The complaint should have been dismissed as premature.

In the case of Woody the alleged violation occurred on June 1, 1949, *eight* not *thirty* days before the complaint was filed. Had Woody testified it would have been shown that she was not the only tenant of this unit.

V.

The motion to alter or amend the judgment was good. See Rule 54(a) Federal Rules of Civil Procedure.

VI.

Paragraphs 1, 2 and 3 of the judgment [R. 36] require its payment at a certain place, in certain forms, in an undivided amount respecting the individuals. Viva C. Shea and Patricia O'Brien, and forfeits the rights of the tenants to the money in case they cannot be found. There is no specification of effort to be made to find such tenants. The District Court had no authority in any of the rent control laws to make these requirements.

VII.

September 1, 1948, Sec. 507 of Title 28, U. S. Code became effective. The section then read:

“(a) It shall be the duty of each United States Attorney, within his district, to:

(1) * * *

(2) Prosecute or defend, for the government,

all civil actions, suits or proceedings in which the United States is concerned; * * *

Section 503 of the same title read:

“The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.”

Paragraph (b) of Sec. 507 of the same title read:

“The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States

attorneys, assistant United States attorneys, and attorneys appointed under Sec. 503 of this title, in the discharge of their respective duties.”

Sec. 507 was amended May 24, 1949, 63 Stat. 100, by the insertion of this clause at the beginning of the section, namely—“Except as otherwise provided by law.”

Section 205 of the Housing and Rent Act of 1949, amending Sec. 206 of the Housing and Rent Act of 1947, provided:

“(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his power in any place *and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.*

Under chapter 31, Title 28, U. S. Code, even after the amendment of May 24, 1949, it is clear that the Attorney General has no authority to appoint attorneys except that specifically given in Secs. 502 and 503 of the chapter. The Attorney General’s authority is to appoint attorneys to assist the United States Attorneys.

It is respectfully submitted that the Attorney General had no authority to grant to attorneys appointed by the Housing Expediter, and that the delegation of authority to attorneys, dated September 24, 1949, signed by the Acting Attorney General, published in the Federal Register of October 6, 1949, is void. This delegation reads:

“Pursuant to the authority vested in me by Sec. 205, Public Law 31, 81st Congress, attorneys appointed by the Housing Expediter are hereby authorized to appear for and represent the United States in

any case arising under Secs. 205 or 206 of the Housing and Rent Act of 1947, as amended, and for that purpose to institute, conduct or maintain all civil actions, suits or proceedings, before or after judgment, arising under said sections of said act, and to defend the United States, the Housing Expediter or any officer or employee thereof, in any case arising under said act: Provided, however, that the foregoing authority shall not apply to any proceedings before the Supreme Court of the United States.

Dated: September 24, 1949.

PEYTON FORD,

Acting Attorney General.

The text of this so-called authority does not even mention authority for attorneys for the Housing Expediter to appear in cases arising under the Emergency Price Control Act of 1942. The complaint in paragraph I [R. 2] shows that this action is brought under Sec. 205(a) of the Emergency Price Control Act of 1942, as amended.

The duplication of legal machinery to represent the United States in the collection of refunds of rent is wholly unauthorized.

Conclusion.

The judgment of the District Court should be reversed.

DANIEL DOUGHERTY,

Attorney for Appellants.

Appendix.

HOUSING AND RENT ACT OF 1949

Sec. 204. (a) Sec. 205 of the Housing and Rent Act of 1947, as amended, is amended by striking out from the heading of such section the words "*By Tenants*"; by inserting after the words "receives such payment", in the first sentence, the following: "(or shall be liable to the United States as hereinafter provided)"; and by changing the period at the end of the second sentence to a colon and inserting: "*Provided, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations.*"

Sec. 205 "(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, *under such authority as may be granted by the Attorney General*, appear for and represent the United States in any case arising under this Act."

No. 12522

**In the United States Court of Appeals
for the Ninth Circuit**

GRACE HARTLEY EMERY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

ED DUPREE,

General Counsel,

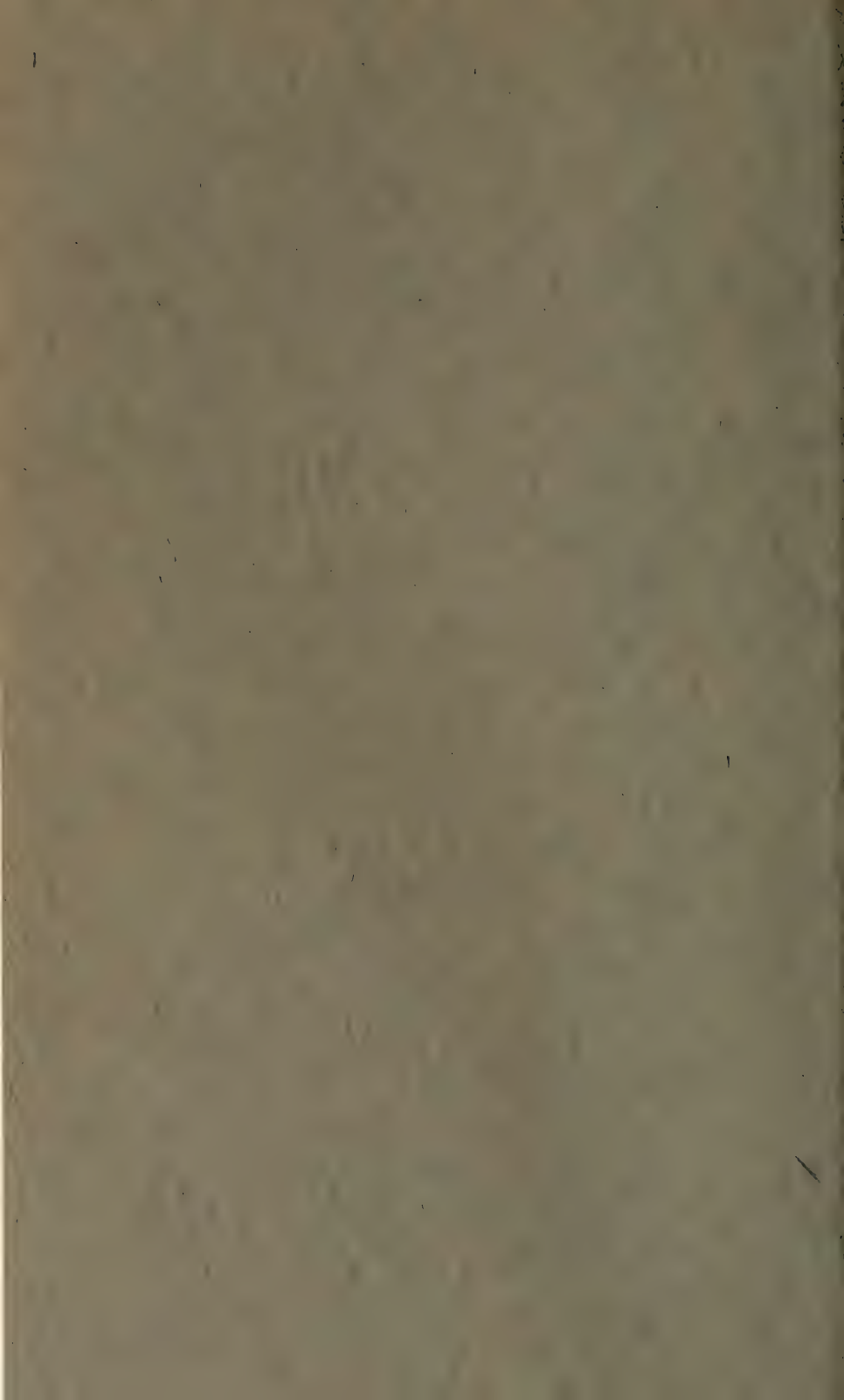
LEON J. LIBEU,

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In the United States Court of Appeals for the Ninth Circuit

No. 12522

GRACE HARTLEY EMERY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

JURISDICTION

This appeal is from a final judgment of the United States District Court for the Southern District of California, Central Division, granting a motion for judgment on the pleadings in an action under the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. 901, et seq.) and the Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. 1881, et seq.) for injunctive relief and restitution of rental overcharges. Judgment was entered on December 21, 1949 (R. 34-37). Notice of Appeal from this judgment was filed on March 15, 1950 (R. 42). Jurisdiction of the District Court was invoked pursuant to Section 205 (a) of the Emergency Price Control Act of 1942, as amended, and Sections 205, 206 (b) and 206 (c) of the Housing and Rent Act of 1947, as amended (R. 2). Juris-

diction of this Court is conferred by Section 1291 of the Judicial Code (28 U. S. C. 1291).

COUNTERSTATEMENT OF FACTS

The appellee, under the provisions of Section 205 (a) of the Emergency Price Control Act and Sections 205 and 206 of the Housing and Rent Act of 1947, as amended, filed its Complaint (R. 2-6) against appellants herein, seeking statutory damages, injunctive relief and restitution of rental overcharges received from tenants of appellants' accommodations located in Los Angeles, California. To this complaint, appellants filed a Motion to Dismiss (R. 7). The Motion to Dismiss was denied (R. 13) (See *United States v. Emery*, 86 F. Supp. 354). Appellants filed their Answer to plaintiff's Complaint (R. 22-24). The answer did not deny any of the allegations charging violation. It merely set forth eight separate defenses (R. 23) which, to the extent not abandoned upon this appeal, will be discussed hereafter. Appellee herein thereafter filed a motion for a judgment on the pleadings (R. 24-26). After a hearing, the trial court granted appellee's motion and entered a judgment for the appellants in the sum of \$1,002.50 as restitution to be disbursed by the plaintiff to certain tenants named in the order of judgment (R. 34-37). The appellants herein appeal from this final judgment (R. 41), and assert the following grounds for reversal:

1. That Section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on

behalf of a tenant against a landlord is unconstitutional.

2. That if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945.

3. That the four tenant beneficiaries who occupied two rental units were indispensable parties plaintiff.

4. The trial court erred in granting summary judgment against appellants.

5. That the trial court erred in denying appellants' motion to alter or amend the judgment under review.

6. That the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money.

7. That the United States Attorney under Section 507 of the United States Code Judiciary and Judicial Procedure was required to appear for plaintiff.

ARGUMENT

I

There is no merit to appellants' first contention that Section 204 of the Housing and Rent Act of 1949 purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is unconstitutional

Appellants' first contention is "That Section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is un-

constitutional.” There is no merit to this contention.

Section 204 of the Act of 1949 (*infra*, p. 17) amended Section 205 of the Housing and Rent Act of 1947, as amended. It confers upon the United States a right to sue for *statutory damages* in the event the tenant fails to sue within thirty days (See *Woods v. Gianoulis*, — F. 2d — (not yet reported) (C. A. 3d). Since the judgment below does not award any statutory damages under Section 205 but merely restitution of overcharges pursuant to Section 206 (b) of the Act, appellants’ objection or challenge to Section 205 is pointless upon this appeal.

II

There is equally no merit to appellants’ second contention “that if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945”

Equally lacking in merit is appellants’ contention “that if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945.”

What has been said above under Point I is likewise dispositive of appellants’ second contention. We are not dealing here with Section 205, as amended by Section 204 of the Act of 1949, as appellants assert. Consideration of the validity of Section 205 must await a case in which judgment has been awarded under that section. Here judgment has been granted pursuant to Section 206 (b) of the 1947 Act for

restitution on account of overcharges received by appellants since January 7, 1945. Recovery by the Government of overcharges for this period by way of restitution is not, however, unlawful, nor does it violate any constitutional rights. On the contrary, the courts have unanimously given effect to this remedy to compel a wrongdoer to disgorge his unlawful gain. The passage of time from the violation to the time of suit does not alter the rule. It is well settled that neither the statute of limitations nor the doctrine of laches may bar the restitution suit by the Government to bring about effective compliance with the Act. (See *Porter v. Warner Holding Co.*, 328 U. S. 395; *Woods v. McCord*, 175 F. 2d 919 (C. A. 9th); *Woods v. Wayne*, 177 F. 2d 259 (C. A. 9th); *Woods v. Gochmour*, 177 F. 2d 764 (C. A. 9th); *Woods v. Richman*, 174 F. 2d 614 (C. A. 9th); *Brooks v. Woods*, 181 F. 2d 716 (C. A. 9th); *Woods v. Wolfe*, 182 F. 2d 516 (C. A. 3rd); *Ebeling v. Woods*, 175 F. 2d 242 (C. A. 3rd); *Woods v. Bomboy*, 179 F. 2d 565 (C. A. 3rd); *Creedon v. Randolph*, 165 F. 2d 918 (C. A. 5th); *Woods v. Witzke*, 174 F. 2d 855 (C. A. 6th). In view of these authorities, further discussion of this point would appear to be unnecessary.¹

¹ For the reasons mentioned above, appellants' reliance upon Judge Rodney's discussion in 9 F. R. D. 501 on statutory damages is likewise immaterial. The *Gianoulis* decision, 86 F. Supp. 933 decided by Judge Rodney, deals with statutory damages, not restitution, and it was reversed by the Third Circuit — F. —. From Judge Rodney's discussion of the restitution remedy (9 F. R. D. 504) it does not appear that his views are contrary to those expressed in the opinions rendered by this and other courts of high distinction.

III

There is no merit whatever to the contention that the four tenant beneficiaries were indispensable parties plaintiff

Appellants' third contention is that the four tenant beneficiaries who occupied the housing accommodations involved in the suit were indispensable party plaintiffs. In this connection, appellant's reliance upon Section 367 of the Code of Civil Procedure is wholly misplaced. This is a statutory action brought by the United States pursuant to federal law as to which federal rather than State statutes, must control. The restitution suit is brought pursuant to Section 205 (a) of the 1942 Act and Section 206 (b) of the 1947 Act. The tenants have no authority to invoke either of these sections (cf. *Hock v. 250 Northern Avenue Corp.*, 142 F. 2d 435 (C. R. 2d)), hence they could not possibly be indispensable parties.

The authority under Section 205 (a) of the 1942 Act is conferred solely upon the Expediter to sue for relief. Similar language is employed in Section 206 (b) of the 1947 Act to sue in his sole discretion (*infra*, p. 15). "Whenever in the judgment of the Housing Expediter" violation is threatened or has occurred, "the United States may make application * * * for an order enjoining such acts or practices * * *" (Sec. 206 (b)) (*infra*, p. 15). In suing for restitution under either the 1942 or 1947 statutes, the Housing Expediter acts in the public interest; the tenants' rights in these suits are merely incidental (*Creedon v. Randolph*, 165 F. 2d 918-9 (C. A. 5th); *Ebeling v. Woods*, 175 F. 2d 242, 245

(C. A. 8th); *Bowles v. Skaggs*, 151 F. 2d 817, 821 (C. A. 6th)).

It is true, of course, that in an action for restitution of overcharges under either Section 205 (a) of the 1942 Act or Section 206 (b) of the 1947 Act, the trial court may, in the exercise of its equity powers, make tenants parties to the action so that conflicting claims between them and the landlord as to counterclaims or offsets may be determined at one time. *Porter v. Warner Holding Company*, 328 U. S. 395, 403.

So here, too, appellants could have moved under Rules 13 (*infra*, p. 18) and 14 of the Federal Rules of Civil Procedure, to bring the tenants in as additional parties. However, appellants did not take that course which was open to them. Instead they persisted in their view that the tenants were indispensable parties. Accordingly, the trial court was clearly right in overruling this objection. (Cf. *Co-Efficient Foundation Co. v. Woods*, 171 F. 2d 69 (C. A. 5th); *McCoy v. Woods*, 177 F. 2d 355, 356 (C. A. 4th)).

IV

Contrary to appellants' fourth contention, the trial court was right in granting judgment upon the pleadings

Appellants next contend the Court below erred in granting judgment upon the pleadings (designated summary judgment by appellant). There is no valid basis for this claim.

The complaint charged appellant with violating the provisions of the Acts of 1942 and 1947, by demanding, accepting and receiving from tenants named in

a Schedule attached to the Complaint, rents in excess of the maximum rents established pursuant to the Acts (R. 2-6).

To this Complaint, appellants filed a Motion to Dismiss (R. 7) which Motion was denied by the trial court (R. 14-17) (*U. S. v. Emery*, 86 F. Supp. 354).² Appellants thereupon attempted to obtain leave to file a second Motion to Dismiss (R. 10-19) which application was likewise dismissed (R. 22). Thereupon, appellants filed their Answer to appellee's Complaint (R. 22-24).

The answer contains no denial of the allegations of violation. It merely sets forth eight legal defenses as a bar to suit (R. 22-23).

Appellee filed a motion for a judgment on the pleadings under the provisions of Rule 12 (c) of the Federal Rules of Civil Procedure (28 U. S. C. A. following Sec. 723c). This motion came on for argument. Appellee waived his right for a judgment as prayed for in paragraph C, 1, 2, 3, and 4 of his Complaint which was concerned with statutory damages (R. 5-6). The Court found that the defenses set forth in appellants' answer did not constitute valid defenses to the allegations of the Complaint and that appellee is entitled to a judgment on the undisputed facts. It thereupon ordered judgment of restitution in the sum of \$1,002.50, to be disbursed to the tenants named in the Complaint and in the order of judgment.

²The views expressed by Judge Yankwich respecting the validity of the Act of 1949 were subsequently upheld by the Supreme Court in *United States v. Shoreline Cooperative Apartments, Inc.*, 338 U. S. 897.

The rule is established that a motion for judgment upon the pleadings admits all facts, well pleaded, but does not admit conclusions of law (*Rosenhan v. United States*, 131 F. 2d 932 (C. A. 10th)).

Examination of the defenses raised in appellants' answer fails to disclose any allegation of material fact as to which there was any dispute. From appellants' failure to deny the allegations contained in Paragraph V of the Complaint (R. 3-4), appellant must be deemed to have admitted making each of the overcharges set forth in the schedule attached to the complaint (R. 6). The defenses raised by answer do not challenge the correctness of any part of this Schedule. The defenses raise only legal issues, which may and should more properly be disposed of by motions for judgment on the pleadings than by needless trial.

V

There was no error by the trial court in its dismissal of defendants' motion to amend the judgment under review

While appellants in their brief have elected to abandon any extended form of argument on the point (Br. p. 12), they still contend that the judgment below is in violation of Rule 54 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A. fol. 723c) which reads in part as follows:

(a) *Definition; Form.*—"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Defendants claim that Lines 20-28 in the order of judgment, including the word "and", should be stricken by reason of this rule. If there was any error in incorporating these particular lines in the order of judgment, which this appellee will not concede, it has not been shown how this language affects any of the substantial rights of these appellants, nor has it been shown that they have been prejudiced in any manner whatsoever. The most that can be said if there was error, is that it is harmless, and in no manner affects the final judgment.

Rule 61 of the Federal Rules of Civil Procedure (Title 28, U. S. C. A. fol. 723e) admonishes the trial court to disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. While this admonition is directed to the District Courts, the principle is one which has consistently found favor with appellate courts (*University City Mo. v. Home Fire & Marine Ins. Co.*, 114 F. 2d 288, 294 (C. A. 8th); *De Santa v. Nehi Co.*, 171 F. 2d 696, 698 (C. A. 2d).

VI

There is no merit to the contention that the judgment entered is "legislative instead of judicial"

Patently lacking in merit is the contention "that the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money." The long-standing practice adopted by almost all district courts

of paying unclaimed restitution refunds to the Treasury is a most practicable one. It enables tenants who have moved upon their later return to apply to the Treasury Department, and to obtain with a minimum of time and trouble the restitution payments allocated to them by a judgment. We fail to see any error whatever in the judgment on this score. Contrary to appellants' contention, the provisions of the judgment were well within the sound exercise of equitable discretion of the trial court. They were also most appropriate both for bringing about complete compliance with the Act and for preventing a violator from benefitting from his own wrong.

VII

There is no merit to the contention that the United States Attorney General under Section 507, Title 28, U. S. C. A., was required by law to appear for the plaintiff

Finally, appellants contend that the United States Attorney General was without power to delegate to the attorneys appointed by the Housing Expediter authority to appear for and represent the United States in any cases arising under this Act.

Section 507 (b) of Title 28, U. S. C. A., relied upon by appellants, provides as follows:

(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under Section 503 of this title, in the discharge of their respective duties.

If there is any doubt as to the power of the Attorney General to delegate in this case, it is resolved both by Section 503 of Title 28 U. S. C. and also by the explicit language of the Housing and Rent Act of 1947, as amended. Sec. 503 of Title 28 U. S. C. provides:

§ 503. *Appointment of attorneys.*—The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

Further authority for the Attorney General to grant and delegate to the Office of the Housing Expediter his power to represent the United States in actions arising under the Housing and Rent Act is found in Section 206 (e) of the Act which reads as follows:

(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

In the light of these sections, it is specious to contend that the delegation of the United States Attorney General, dated September 24, 1949 (14 F. R. 6097) which confers upon the attorneys appointed by the Housing Expediter the right to represent the United States in any case arising under Sections

205 or 206 of the Housing and Rent Act of 1947, as amended, is without power and effect. What appellants are endeavoring to say is that the Congress of the United States is without power to designate what attorneys shall represent the Government. Similar contention was advanced and rejected in *Case v. Bowles*, 327 U. S. 92, 96, affirming *Bowles v. Case*, 149 F. 2d 777 (C. A. 9). In that case the State of Washington urged that the complaint filed by the Price Administrator should be dismissed because it was signed by attorneys employed by the Price Administrator and not by the District Attorney or employees of the Department of Justice. Holding this contention to be untenable, the Supreme Court adopting the view previously expressed by the Court in its opinion below, said the following (p. 96-97):

* * * True, 28 U. S. C. 485 makes it the duty of every district attorney to prosecute most civil actions to which the United States is a party. But this section does not prescribe the procedure under the Emergency Price Control Act for that Act specifically empowers the Administrator to commence actions such as this one and authorizes attorneys employed by him to represent him in such actions, § 201 (a).

So here, too, 28 U. S. C., Section 485 does not prescribe the procedure under the Housing and Rent Act of 1947, as amended, for that Act also specifically empowers the Expediter to commence actions such as this one under such authority as may be granted by the Attorney General.

CONCLUSION

It is respectfully submitted that the grounds for reversal relied on by appellants are wholly without merit and the judgment of the District Court should be affirmed.

Respectfully submitted.

ED DUPREE,

General Counsel,

LEON J. LIBEU,

Assistant General Counsel,

WILLIAM A. MORAN,

Special Litigation Attorney,

Office of the Housing Expediter,

Washington 25, D. C.

APPENDIX

(1) Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. 901, et seq.):

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(2) Housing and Rent Act of 1947 (P. L. 129, 80th Cong., 1st Sess.):

SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(3) Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. 1881, et seq.):

RECOVERY OF DAMAGES BY TENANT

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided*, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation

with respect to the same plaintiff prior to the institution of the action in which such judgment was rendered.

SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(4) Housing and Rent Act of 1947, as amended (P. L. 31, 81st Cong., 1st Sess.):

SEC. 204. (a) Section 205 of the Housing and Rent Act of 1947, as amended, is amended by striking out from the heading of such section the words "BY TENANTS"; by inserting after the words "receives such payment", in the first sentence, the following: "(or shall be liable to the United States as hereinafter provided)"; and by changing the period at the end of the second sentence to a colon and inserting: "*Provided*, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, and received shall thereafter be barred from bringing an action for the same violation or violations."

Section 206 of the Housing and Rent Act of 1947, as amended, is amended to read as follows:

(c) Any proceeding brought in a Federal court under section 205 or under subsection (b) of this section may be brought in any district in which any part of any act or transaction constituting the violation occurred, or may be brought in the district in which the defendant resides or transacts business, and process in such case may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any such proceeding brought before it. No costs shall be assessed against the Housing Expediter or the United States Government in any proceeding under this Act.

(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

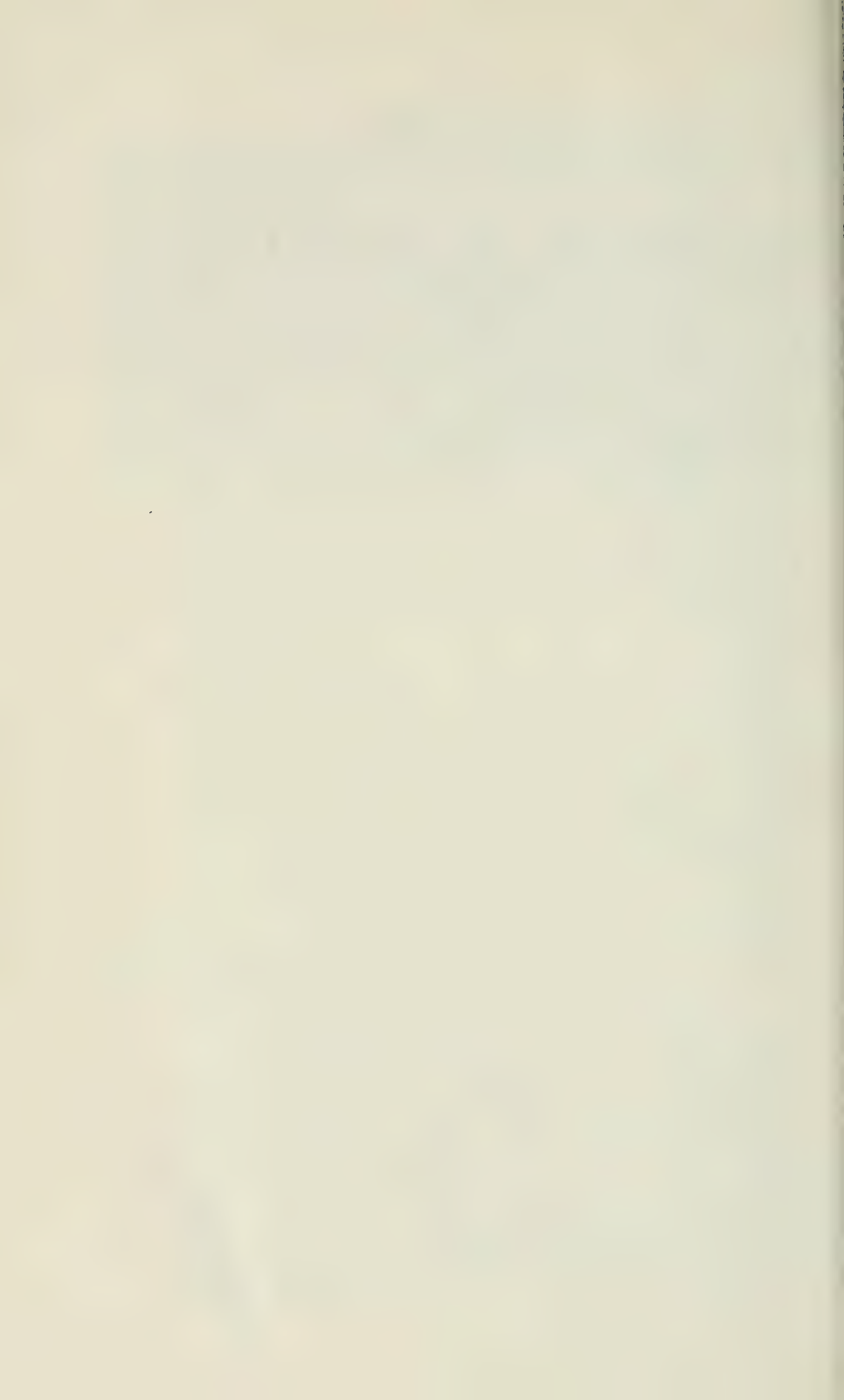
(5) Federal Rules of Civil Procedure (28 U. S. C. A. fol. 723c):

RULE 13. COUNTERCLAIM AND CROSS-CLAIM.

(h) *Additional parties may be brought in.*—When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

RULE 61. HARMLESS ERROR.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.



No. 12523

United States
Court of Appeals
For the Ninth Circuit.

OSCAR EWING, Federal Security Administrator,
Appellant,

vs.

ARCHIE F. McLEAN,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho
Southern Division.

FILED

JUL 10 1950

PAUL P. O'BRIEN,
CLERK

No. 12523

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,
District of Idaho,

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District of Idaho,

P. O. Box 1776,
Boise, Idaho.

MARSHALL CHAPMAN,

P. O. Box 309,
Twin Falls, Idaho,

Attorneys for Appellee.

District Court of the United States for the District
of Idaho, Southern Division

No. 2593

ARCHIE F. McLEAN,

Plaintiff,

vs.

OSCAR EWING,

Defendant.

COMPLAINT

Comes Now, the plaintiff above named and complains of the defendant above named, and for cause of action alleges:

I.

That the plaintiff, Archie F. McLean, is a resident of the State of Idaho and resides in the District of Idaho, Southern Division, District Court of the United States, hereinabove set forth.

II.

That the defendant, Oscar Ewing, is the duly appointed qualified and acting Federal Security Administrator charged with the duty of administering what is commonly known as the Social Security Act.

III.

That the plaintiff, Archie F. McLean, earned during the calendar quarter ending December 31, 1941, the sum of One Hundred Ten and 25/100 (\$110.25) Dollars; during the calendar quarter end-

ing March 31, 1942, the sum of Two Hundred Fifty-seven and 33/100 (\$257.33) Dollars; during the calendar quarter ending June 30, 1942, the sum of One Hundred Forty-one and 35/100 (\$141.35) Dollars; during the calendar quarter ending September 30, 1942, the sum of One Hundred Thirty-three and 12/100 (\$133.12) Dollars, and during the calendar quarter ending December 31, 1942, the sum of Three Hundred Fifty-six and 98/100 (\$356.98), and during which time said plaintiff was employed by Albert Miller and Company at Burley, Idaho, and that the services rendered by plaintiff to said Albert Miller and Company during the periods aforesaid, were as follows:

- (a) Feeding potatoes into sorter and washer;
- (b) Working on sorting table;
- (c) Removing bags from sorting machine,
and
- (d) Assisting in loading railroad freight cars
and assisting in loading trucks and other vehicles from warehouse.

IV.

That plaintiff performed four full quarters of work for and on behalf of the Albert Miller and Company at its Burley warehouse, and in addition to the services rendered by plaintiff to said Albert Miller and Company, said plaintiff performed services for other employers, which employment was covered by the Social Security Act, constituting thirteen (13) quarters on the 20th day of Novem-

ber, 1945, at which time plaintiff ceased to be employed, and that upon said date plaintiff was eligible to the benefits of the Social Security Act.

V.

That plaintiff thereafter made application to the Social Security Administration for the benefits accruing to plaintiff under the provisions of the Social Security Act by reason of the employment of plaintiff for a period of seventeen (17) quarters prior to ceasing his employment and after having reached the age of sixty-five (65) years; that thereafter a hearing was had upon plaintiff's application for benefits under the Social Security Act, before Martin Tieburg, Referee, on the 8th day of July, 1946, and that said Referee held that plaintiff was not entitled to receive the benefits of the Social Security Act for the reason and upon the ground that the services performed by plaintiff for the Albert Miller and Company was excepted from the Social Security Act under the provisions of Section 209 (1) (4); that thereafter, plaintiff requested for a review of the Referee's decision, and the matter was reviewed by the Appeals Council and a decision rendered by said Appeals Council of the Social Security Administration under date of July 2, 1948, in which said Appeals Council held that plaintiff was not entitled to the benefits of the Social Security Act for the reason and upon the ground that the services rendered by plaintiff for the Albert Miller and Company at Burley, Idaho, was excepted employment as agricultural labor un-

der the provisions of Section 209 (1) (4) U. S. C. A. of the Social Security Act as amended, and that the Warehouse of the Albert Miller and Company in Burley, Idaho, where the plaintiff was employed did not constitute a "terminal market" within the meaning of that section of the Act, and that the operations performed by the Company in its Burley Warehouse were performed "as an incident to the preparation of potatoes for market."

VI.

That the Albert Miller and Company at Burley, Idaho, was engaged in the business of purchasing potatoes from farmers for the purpose of re-sale, either in interstate commerce or locally, from its warehouse at Burley, Idaho, and that after the purchase of said potatoes from the farmers said Albert Miller and Company transported said potatoes to its warehouse at Burley, Idaho, where said potatoes were sorted, washed and sacked according to grade, and thereafter resold by said Albert Miller and Company, either in interstate commerce or locally, and that at the time the plaintiff herein performed his services for and on behalf of said Albert Miller and Company, the farmers had parted title in said potatoes and had no further interest therein and that the warehouse operated by said Albert Miller and Company at Burley, Idaho, was both a "growers market" or "terminal market" within the provisions of Section 409 (1) (4), Title 42, U. S. C. A., in that said warehouse was a place where the farmers customarily parted with all their economic

interest in said potatoes, their future form or destiny, and that when said potatoes reached said warehouse said warehouse was then in the practical control of the Albert Miller and Company, a selling organization, and that the said Albert Miller and Company operated said warehouse at Burley, Idaho, as a purely commercial operation in the business of buying potatoes from farmers and thereafter selling said potatoes for its private profit after said Company had sorted, cleaned, bagged and otherwise processed said potatoes, and that the services performed by plaintiff during the period of time hereinabove alleged was not agricultural services within the meaning of Section 409 (1) (4) of the Social Security Act, United States Code Annotated.

VII.

That the decision of the Appeals Council of the Social Security Administration of the United States, rendered on the 2nd day of July, 1948, was contrary to law in refusing to compute the monthly benefits payable to plaintiff under the Act and to declare plaintiff to be eligible thereafter, and in eliminating as excepted employment under the Social Security Act the services performed by plaintiff for the Albert Miller and Company at its warehouse at Burley, Idaho.

Wherefore, Plaintiff prays that the decision of the Appeal Council of the Social Security Administration of the United States dated July 2, 1948, be reversed and this cause be remanded, with di-

rections to said Appeals Council to compute the benefits to which plaintiff is entitled under the Social Security Act, and in so doing to include the payments amounting to Nine Hundred Ninety-nine and 3/100 (\$999.03) Dollars, made to plaintiff by Albert Miller and Company, in the following quarters:

December 31, 1941,
March 31, 1942,
June 30, 1942,
September 30, 1942,
December 31, 1942,

as part of his total wages in determining the amount of his primary insurance benefits as provided in Section 409 (e) (f) Title 42, United States Code Annotated, and that plaintiff be decreed to be entitled to the benefits of the Social Security Act from and after the 20th day of November, 1945; that plaintiff may have such other and further relief in the premises as equity and this court shall deem appropriate.

/s/ MARSHALL CHAPMAN,
Attorney for Plaintiff.

State of Idaho,
County of Twin Falls—ss.

Archie F. McLean, being first duly sworn, on oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint,

know the contents thereof, and that he believes the statements contained therein to be true.

/s/ ARCHIE F. McLEAN.

Subscribed and Sworn to before me this 24th day of August, A.D., 1948.

[Seal] /s/ MARSHALL CHAPMAN,
Notary Public for Idaho Residing at Twin Falls,
Idaho.

[Endorsed]: Filed August 31, 1948.

[Title of District Court and Cause.]

MOTION

Comes now the United States Attorney for the District of Idaho and moves to dismiss the complaint heretofore filed by the plaintiff, on the following grounds:

I.

That said complaint fails to state a claim upon which relief can be granted.

II.

That Oscar Ewing is an improper party defendant; that the United States of America is the proper party defendant for the reason that it appears that the plaintiff is suing the Federal Security Administrator, an agency of the United States government.

III.

That the Court lacks jurisdiction over the person of Oscar Ewing.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed September 24, 1948.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now, the Plaintiff above-named and complains of the defendant above-named, and for cause of action alleges:

I.

That the plaintiff, Archie F. McLean, is a resident of the State of Idaho, and resides in the District of Idaho, Southern Division, District Court of the United States, hereinabove set forth.

II.

That the defendant, Oscar Eking, is the duly appointed qualified and acting Federal Security Administrator charged with the duty of administering what is commonly known as the Social Security Act.

III.

That the plaintiff, Archie F. McLean, earned during the calendar quarter ending December 31,

1941, the sum of One Hundred Ten and 25/100 (\$110.25) Dollars; during the calendar quarter ending March 31, 1942, the sum of Two Hundred Fifty-seven and 33/100 (\$257.33) Dollars; during the calendar quarter ending June 30, 1942, the sum of One Hundred Forty-one and 35/100 (\$141.35) Dollars; during the calendar quarter ending September 30, 1942, the sum of One Hundred Thirty-three and 12/100 (\$133.12) Dollars, and during the calendar quarter ending December 31, 1942, the sum of Three Hundred Fifty-six and 98/100 (\$356.98), and during which time said plaintiff was employed by Albert Miller and Company at Burley, Idaho, and that the services rendered by plaintiff to said Albert Miller and Company during the periods aforesaid, were as follows:

- (a) Feeding potatoes into sorter and washer;
- (b) Working on sorting table;
- (c) Removing bags from sorting machine, and
- (d) Assisting in loading railroad freight cars and assisting in loading trucks and other vehicles from warehouse.

IV.

That plaintiff performed four full quarters of work for and on behalf of the Albert Miller and Company at its Burley warehouse, and in addition to the services rendered by plaintiff to said Albert Miller and Company, said plaintiff performed serv-

ices for other employers, which employment was covered by the Social Security Act, constituting thirteen (13) quarters on the 20th day of November, 1945, at which time plaintiff ceased to be employed, and that upon said date plaintiff was eligible to the benefits of the Social Security Act.

V.

That plaintiff thereafter made application to the Social Security Administration for the benefits accruing to plaintiff under the provisions of the Social Security Act by reason of the employment of plaintiff for a period of seventeen (17) quarters prior to ceasing his employment and after having reached the age of sixty-five (65) years; that thereafter a hearing was had upon plaintiff's application for benefits under the Social Security Act, before Martin Tieburg, Referee, on the 8th day of July, 1946, and that said Referee held that plaintiff was not entitled to receive the benefits of the Social Security Act for the reason and upon the ground that the services performed by Plaintiff for the Albert Miller and Company was excepted from the Social Security Act under the provisions of Section 209 (1) (4); that thereafter, plaintiff requested for a review of the Referee's decision, and the matter was reviewed by the Appeals Council and a decision rendered by said Appeals Council of the Social Security Administration under date of July 2, 1948, in which said Appeals Council held that plaintiff was not entitled to the benefits of the Social Security Act for the reason and upon the

ground that the services rendered by plaintiff for the Albert Miller and Company at Burley, Idaho, was excepted employment as agricultural labor under the provisions of Section 209 (1) (4) U. S. C. A. of the Social Security Act as amended, and that the Warehouse of the Albert Miller and Company in Burley, Idaho, where the plaintiff was employed did not constitute a "terminal market" within the meaning of that section of the Act, and that the operations performed by the Company in its Burley Warehouse were performed "as an incident to the preparation of potatoes for market."

VI.

That the Albert Miller and Company at Burley, Idaho, was engaged in the business of purchasing potatoes from farmers for the purpose of resale, either in interstate commerce or locally, from its warehouse at Burley, Idaho, and that after the purchase of said potatoes from the farmers said Albert Miller and Company transported said potatoes to its warehouse at Burley, Idaho, where said potatoes were sorted, washed and sacked according to grade, and thereafter resold by said Albert Miller and Company, either in interstate commerce or locally, and that at the time the plaintiff herein performed his services for and on behalf of said Albert Miller and Company, the farmers had parted title in said potatoes and had no further interest therein and that the warehouse operated by said Albert Miller and Company at Burley, Idaho, was

both a "growers market" or "terminal market" within the provisions of Section 409 (1) (4), Title 42, U. S. C. A., in that said warehouse was a place where the farmers customarily parted with all their economic interest in said potatoes, their future form or destiny, and that when said potatoes reached said warehouse said warehouse was then in the practical control of the Albert Miller and Company, a selling organization, and that the said Albert Miller and Company operated said warehouse at Burley, Idaho, as a purely commercial operation in the business of buying potatoes from farmers and thereafter selling said potatoes for its private profit after said Company had sorted, cleaned, bagged and otherwise processed said potatoes, and that the services performed by plaintiff during the period of time hereinabove alleged was not agricultural services within the meaning of Section 409 (1) (4) of the Social Security Act, United States Code Annotated.

VII.

That the decision of the Appeals Council of the Social Security Administration of the United States, rendered on the 2nd day of July, 1948, was contrary to law in refusing to compute the monthly benefits payable to plaintiff under the Act and to declare plaintiff to be eligible thereafter, and in eliminating as excepted employment under the Social Security Act the services performed by plaintiff for the Albert Miller and Company at its warehouse at Burley, Idaho.

Wherefore, Plaintiff prays that the decision of the Appeal Council of the Social Security Administration of the United States dated July 2, 1948, be reversed and this cause be remanded, with directions to said Appeals Council to compute the benefits to which plaintiff is entitled under the Social Security Act, and in so doing to include the payments amounting to Nine Hundred Ninety-nine and 03/100 (\$999.03) Dollars, made to plaintiff by Albert Miller and Company, in the following Quarters:

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as part of his total wages in determining the amount of his primary insurance benefits as provided in Section 409 (e) (f) Title 42, United States Code Annotated, and that plaintiff be decreed to be entitled to the benefits of the Social Security Act from and after the 20th day of November, 1945; that plaintiff may have such other and further relief in the premises as equity and this court shall deem appropriate.

/s/ MARSHALL CHAPMAN,
Attorney for Plaintiff.

State of Idaho,
County of Twin Falls—ss.

Marshall Chapman, Being first duly sworn, on oath, deposes and says:

That he is the attorney for the within named plaintiff, Archie F. McLean, and makes this verification for and on behalf of said plaintiff for the reason that he is not a resident of and within the County of Twin Falls wherein this affiant resides; that he has read the within and foregoing Amended Complaint, knows the contents thereof, and that he believes the statements therein contained to be true.

/s/ MARSHALL CHAPMAN.

Subscribed and Sworn to before me this 29 day of October, A.D., 1948.

[Seal] /s/ EARL R. STANSELL,
Notary Public for Idaho, Residing at Twin Falls,
Idaho.

[Endorsed]: Filed October 30, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now, the defendant, Oscar Ewing, Federal Security Administrator, by his attorneys of record, John A. Carver, United States Attorney in and for the District of Idaho, and Paul S. Boyd, Assistant United States Attorney, and for his answer to the complaint filed herein says:

First Defense

1. The plaintiff has no claim upon which relief

can be granted, as shown by the provisions of the Social Security Act, as amended, by the regulations of the Social Security Administration promulgated thereunder, by the transcript of the record upon which the decision complained of was made, and by the findings and conclusions of the Social Security Administration based thereon.

Second Defense

2. The facts as found by the Referee of the Social Security Administration and by the Appeals Council of that Administration show that plaintiff's services rendered Albert Miller and Company in 1941 and 1942 were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended. Under the applicable regulations and practices, the decision of the Appeals Council became the final decision of the Federal Security Administrator. The findings are supported by substantial evidence and are conclusive. The defendant, therefore, properly decided that plaintiff was not entitled to wage credits for his earnings for said services.

Third Defense

3. Defendant admits the allegations contained in paragraph I, and II, of the complaint.

4. Answering paragraphs III, IV, V, and VI, of the complaint, defendants refers to the findings of fact of the Social Security Administration con-

tained in the transcript of the record, filed herewith as part of this answer, as establishing the facts on which this action to review is based, and except as herein admitted denies each and every allegation in said paragraphs.

5. Further answering paragraph III, of the complaint, defendant admits the allegations contained therein but alleges that the aforesaid services of the plaintiff was performed as an incident to the preparation of the potatoes for market and were not performed in connection with commercial canning or commercial freezing nor after delivery of the potatoes to a terminal market for distribution for consumption.

6. Further answering paragraph IV, of the complaint defendant admits that plaintiff performed four full quarters of work for Albert Miller and Company, and that he also performed services for other employers, but denies that such other employment constituted 13 quarters on the 20th day of November, 1945. Defendant further denies that on said date plaintiff was eligible to the benefits of the Social Security Act.

7. Further answering paragraph V, of the complaint, defendant admits that plaintiff filed an application for benefits under the Social Security Act, but denies that plaintiff was employed as claimed for a period of 17 quarters prior to ceasing his employment and after having reached the age of 65 years. Defendant admits that a hearing was had be-

fore Martin Tieburg, Referee, on July 8, 1946, but denies that the hearing was "pon plaintiff's application for benefits." Defendant alleges that the hearing was a wage-record revision proceeding (Section 205(c)(3) of the Social Security Act, as amended, 42 U.S.C.A. 405(c)(3)), to determine whether the wage record kept by the Social Security Administration should be revised so as to include therein salary received by plaintiff for services rendered for Albert Miller and Company in 1941 and 1942. Defendant denies that the Referee held that the plaintiff was not entitled to receive the benefits of the Social Security Act but admits that the Referee held that the services performed by plaintiff for Albert Miller and Company were excepted from the Social Security Act under the provisions of Section 209(1)(4). Defendant further admits that at the request of plaintiff the Appeals Council of the Social Security Administration reviewed the Referee's decision and held that plaintiff's services rendered Albert Miller and Company in 1941 and 1942 were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended, but denies that the Appeals Council held that the plaintiff was not entitled to the benefits of the Social Security Act.

8. Further answering paragraph VI of the complaint, defendant denies that Albert Miller and Company was a "growers' market" or "terminal Market" within the provisions of Section 409(1)(4) Title 42 U.S.C.A. Defendant denies that the serv-

ices performed by plaintiff for Albert Miller and Company were not "agricultural labor" within the meaning of said Section. Defendant denies that any more than approximately one-half of the potatoes were sorted, washed, and packed after their purchase from the farmers by Albert Miller and Company. Defendant denies that at the time the plaintiff performed his services for Albert Miller and Company that the farmers had no further interest in the potatoes; and in this connection, defendant alleges that plaintiff's services were chiefly with respect to the potatoes which were purchased and paid for on the basis of sorting and grading in the company's warehouse. Defendant further alleges that approximately 60 per cent of the potatoes handled by Albert Miller and Company at Burley, Idaho, were not re-sold locally but rather were sold in interstate commerce in carload lots to wholesalers and dealers in various points in the United States, and that all the plaintiff's services for Albert Miller and Company were in connection with the potatoes so shipped in interstate commerce to wholesalers and dealers and not to retailers or consumers.

9. Defendant denies the allegations contained in paragraph VII of the complaint.

10. Further answering the allegations of the complaint, the defendant states that the proceedings before the Referee and the Appeals Council were under Section 205(c)(3) of the Social Security Act, as amended, 42 U.S.C.A. 405(c)(3), to determine

whether the wage records kept by the Social Security Administration should be revised so as to include therein salary received by plaintiff for his services for Albert Miller and Company in 1941 and 1942; that the plaintiff's application for benefits is not in the required condition to be acted upon and has never been allowed or disallowed by the Bureau of Old-Age and Survivors Insurance and that the question of plaintiff's entitlement to benefits was not determined by the Referee or by the Appeals Council, the sole subject matter of the proceedings before the Referee and the Appeals Council being the question as to whether plaintiff's services for Albert Miller and Company were excepted from coverage under the Social Security Act, as "agricultural labor" under the provisions of Section 209(1)(4) of the Act; that if the Court were to hold that such services were in covered employment and not excepted as "agricultural labor," it is possible that the plaintiff would be able to qualify for benefits, but that it would first require further proceedings by the Bureau of Old-Age and Survivors Insurance to make its determination as to how many quarters of coverage the plaintiff has in other covered employment and the total amount of his wage credits, and as to whether the plaintiff is of the requisite age has met the other statutory conditions for entitlement to benefits; that there has been no administrative determination as to these other statutory conditions for establishing entitlement to benefits and that the plaintiff has not exhausted his admin-

istrative remedies with respect thereto. Therefore, the only jurisdiction of the Court in this case (if otherwise properly brought) is to review the decision of the Appeals Council of the Social Security Administration, holding that the services rendered by plaintiff for Albert Miller and Company were excepted from employment as "agricultural labor."

11. Defendant denies each and every allegation in the complaint, not herein admitted, controverted or specifically denied.

12. In accordance with the provisions of Title II, Sec. 205(g) of the Social Security Act, as amended, 42 U.S.C.A. Sec. 405(g), defendant files herewith as part of his answer a certified copy of the transcript of the record, including the evidence upon which the findings and decision complained of are based.

Wherefore, defendant prays for a judgment dismissing the complaint with costs and disbursements and for judgment in accordance with Section 205(g) of the Social Security Act, as amended, affirming the decision of the Social Security Administration herein complained of; and for such other relief as may be appropriate.

/s/ JOHN A. CARVER,

United States Attorney.

/s/ PAUL S. BOYD,

Assistant United States Attorney, Attorneys for
Defendant.

I hereby certify that I have served a copy of the foregoing answer upon Marshall Chapman, Esquire, Attorney for the plaintiff, by mailing a copy of the same to him, at 248 Third Avenue East, Twin Falls, Idaho, this 3d day of December, A.D. 1948.

/s/ PAUL S. BOYD,

Assistant United States
Attorney.

[Endorsed]: Filed December 3, 1948.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, Oscar Ewing, the Federal Security Administrator, by his attorneys of record, John A. Carver, United States Attorney in and for the District of Idaho, and Paul S. Boyd, Assistant United States Attorney, and respectfully moves this Court for summary judgment in the above-entitled action pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law, and for judgment in accordance with Section 205(g) of Title II of the Social Security Act, as amended, affirming the decision of the Social Security Administration herein complained of.

/s/ JOHN A. CARVER,

United States Attorney.

/s/ PAUL S. BOYD,

Assistant United States Attorney, Attorneys for
Defendant.

NOTICE OF MOTION

To: Marshall Chapman, Esquire
248 Third Avenue East,
Twin Falls, Idaho.

Please take notice that the undersigned will bring the foregoing motion for summary judgment on for hearing before this Court in Room . . . , United States Courthouse, City of Boise, Idaho, on the 20th day of December, 1948, at 11:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ JOHN A. CARVER,
United States Attorney.

/s/ PAUL S. BOYD,
Assistant United States Attorney, Attorneys for
Defendant.

I hereby certify that I have sent a true copy of the foregoing motion and notice and of the memorandum brief in support of defendant's motion to Marshall Chapman, Esquire, Attorney for plaintiff, by mailing a copy thereof in an envelope bearing Government frank and addressed to him at 248 Third Avenue East, Twin Falls, Idaho, this 3rd day of December, A.W. 1948.

/s/ PAUL S. BOYD,
Assistant United States
Attorney.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND FOR JUDGMENT AFFIRMING THE DECISION OF THE SOCIAL SECURITY ADMINISTRATION UNDER REVIEW

The defendant has moved for summary judgment on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law (Rule 56(b) Federal Rules of Civil Procedure), and for judgment in accordance with Section 205(g) of the Social Security Act, as amended, (Title 42, U.S.C., Section 405 (g)), affirming the decision of the Social Security Administration herein complained of.

The complaint does not refer to any specific section of the Social Security Act as sustaining the Court's jurisdiction (See Rule 8(a) Federal Rules of Civil Procedure). However, the action was presumably filed pursuant to Section 205(g) of the Act to review a determination of the Appeals Council of the Social Security Administration rendered on July 2, 1948, which decided that plaintiff's services rendered Albert Miller and Company in 1941 and 1942 were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended, and hence that no part of his alleged earnings of \$999.03 for such services should be included in com-

puting any primary insurance benefit to which he might be entitled. The primary insurance benefit is calculated from the "average monthly wage" (Section 209(e) of the Act, as amended, 42 U.S.C. 409(e)) which, in turn is computed on the basis of the statutory "wages" (Section 209(f) of the Act, as amended, 42 U.S.C. 409).

In this action plaintiff seeks (1) the reversal of the decision of the Appeals Council which held that his services for Albert Miller and Company in 1941 and 1942 were excepted from operation of the Act, as amended; (2) that the Social Security Administration be compelled to include payments for such services allegedly amounting to \$999.03 as a part of his total wages in determining the amount of his primary insurance benefit; and (3) that he be decreed to be entitled to the benefits of the Social Security Act from and after November 20, 1945.

The proceedings before the Referee and the Appeals Council were under Section 205(c)(3) of the Social Security Act, as amended, 42 U.S.C.A. 405 (c)(3), to determine whether the wage records kept by the Social Security Administration should be revised so as to include therein salary received by plaintiff for his services for Albert Miller and Company in 1941 and 1942. The plaintiff's application for benefits is not in the required condition to be acted upon and has never been allowed or disallowed by the Bureau of Old-Age and Survivors Insurance. The question of plaintiff's eligibility for benefits was not determined by the Referee or by

the Appeals Council. The sole subject matter of the proceedings before the Referee and the Appeals Council was the question of whether plaintiff's services for Albert Miller and Company were excepted from coverage under the Social Security Act, as "agricultural labor" under the provisions of Section 209(1)(4) of the Act. If this Court should hold that such services were in covered employment and not excepted as "agricultural labor," it is possible that the plaintiff would be able to qualify for benefits, but it would first require further proceedings by the Bureau of Old-Age and Survivors Insurance to make its determination as to how many quarters of coverage the plaintiff has in other covered employment and the total amount of his wage credits, and also whether the plaintiff is of the requisite age and has met the other statutory conditions to entitle him to benefits. There has been no administrative determination as to these other statutory conditions for establishing eligibility to benefits, and accordingly the plaintiff has not exhausted his administrative remedies with respect thereto. Therefore, the only jurisdiction of the Court in this case (if otherwise properly brought) is to review the decision of the Appeals Council of the Social Security Administration, holding that the services rendered by plaintiff for Albert Miller and Company were excepted from employment as "agricultural labor." If the Court should decide the issue here in favor of the plaintiff it could not order benefits paid to plaintiff but could only refer the

matter back to the Social Security Administration for further proceedings.

The Issue

The only issue in this case is whether as a matter of law, the Social Security Administration erred in deciding that plaintiff's services rendered Albert Miller and Company in the handling of potatoes at its warehouse in Burley, Idaho, in 1941 and 1942 were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended, and that thus plaintiff was not entitled to wage credits for his earnings for such services.

The Facts

The plaintiff in the month of November, 1941, commenced rendering services for Albert Miller and Company in its Burley, Idaho, warehouse or packing shed, and was employed and paid salary in the months of November, 1941, through November, 1942, except in the months of June, July and August, 1942.¹ The Albert Miller and Company, a corporation, had its principal office in Chicago, Illinois, and is designated as a "earlot potato distributor."

It is customary in the production of potatoes in the district in which the company's Burley, Idaho, warehouse is situated, for the farmers to har-

¹Apparently the company discontinued its Burley warehouse in 1944 (Tr. 59).

vest their potatoes and place them in storage cellars in bulk without sorting or grading them. At that point they are not as yet ready for distribution to the consuming public, as potatoes there raised are sold in two grades, to wit: U. S. No. 1's and U. S. No. 2's. With respect to the potatoes handled by the company in Burley, usually they were purchased from the farmers after they had been placed in the farmer's cellar, and were either purchased and paid for as a lot as they stood in the cellar or after grading into U. S. No. 1's and U. S. No. 2's, either in the farmer's cellar or in the company's warehouse, the sorting and grading being done by the company whether in the farmer's cellar or in its own warehouse after trucking the potatoes to the warehouse at its own expense. Approximately one-half. Regardless of how they were purchased and paid for on the basis of measurement or sorting and grading in the farmer's cellar, and the other half on the basis of sorting and grading in the warehouse. Regardless of how they were purchased and paid for, most of the potatoes were brought into the warehouse either in bulk or in sacks, for the purpose of further washing, sorting and grading. The first function of the warehouse operation was to feed all of the potatoes through the washer, then to sort them into two grades above noted. All of the U. S. No. 1's were then packed in 100-pound sacks with the exception of the choice and largest potatoes which were packed in 10-pound and 25-pound sacks, and some of the No. 2's were packaged

in 100-pound sacks and others of the No. 2's were placed in bins in bulk awaiting shipment. Immediately after such packing in sacks, they were either shipped in carload lots to various United States markets as directed by the home office, or were stored in the basement of the company's warehouse awaiting developments in the potato markets.

Approximately sixty per cent of the potatoes were shipped in carload lots to wholesalers and dealers in various cities in the United States upon directions received from the company's Chicago office, and the wholesalers and dealers then distributed them to various retailers and dealers, who in turn distributed them to the consuming public. The other approximately forty per cent of such potatoes were sold by the manager of the Burley warehouse, under general authority given by the company, to local produce companies, local, intrastate, and interstate transportation companies, restaurants, stores, and private individuals. Most of the potatoes which were sold locally from the warehouse had been purchased directly from the growers, having been sorted and graded in the growers' cellars and were not washed or sorted in the warehouse.

The principal activity which the plaintiff engaged in while employed by the company, consisted of approximately 45 per cent in washing operations and 55 per cent in grading operations at the Burley warehouse, neither of which operations was performed in the warehouse respecting potatoes sold

locally. His services related solely to the potatoes (sixty per cent of the total handled) which were shipped interstate in carload lots to wholesalers and dealers located at distant points from Burley, Idaho.

The referee's decision also contains the finding, "Upon taking the potatoes from the farmer, and in some cases previous to the actual taking of said potatoes from the farm to the warehouse, the title to the potatoes passed to the company, and through all stages of the company's operations the potatoes handled were the property of the company." This finding might appear inconsistent with the finding, as to a large part of the potatoes handled, that such potatoes were purchased and paid for on the basis of sorting and grading into U. S. No. 1's and U. S. No. 2's, by the company. This was the case as to the approximately one-half of all the potatoes handled, which the referee found were purchased and paid for on the basis of sorting and grading in the company's warehouse, and also as to such of the potatoes as were purchased and paid for on the basis of sorting and grading by the company in the farmer's cellar. Perhaps the apparent inconsistency can be explained by the fact that where, although the potatoes were in bulk, they were purchased by the company, not in bulk, but rather as U. S. No. 1's and U. S. No. 2's, in accordance with the results of sorting and grading to be done by the company, it is very difficult to determine whether title passes before, or after, the potatoes

have been sorted and graded into U. S. No. 1's and U. S. No. 2's, and because, even though title passed to the company before the sorting and grading, the farmer retained an economic interest in the potatoes, since his return could not be measured until after the sorting and grading.

The Administrative Proceedings

The plaintiff disagreed with a determination of the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, whereby he was disallowde wage credits for his earnings for services which he had rendered for Albert Miller and Company, in the handling of potatoes at its warehouse in Burley, Idaho, in 1941 and 1942. He filed a requests for a hearing before a Referee of the Social Security Administration. (The right of an individual to a hearing with respect to any "alleged omission of wages of such individual" in the wage records maintained by the Administrator, is provided for by Section 205(c)(3) of the Social Security Act, as amended, and Section 403.703 of Social Security Administration Regulations No. 3.) Such a hearing was held on March 26, 1946, and resulted in a decision (Tr. 16-19) by the Referee, dated July 8, 1946, that the services performed by the plaintiff for Albert Miller and Company, were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended, and that hence "the wage records kept

by the Board should not be revised to include therein salary received by claimant for services rendered for Albert Miller and Company.” In reaching this decision, the Referee found, *inter alia*, that the Burley warehouse of the company was not a “terminal market,” and that the company’s operations in its Burley warehouse were “an incident to the preparation of” the potatoes for market. Plaintiff requested and obtained from the Appeals Council, a review of the Referee’s decision. The Appeals Council, at plaintiff’s request, received evidence in addition to that which was before the Referee, and on July 2, 1948, issued its decision (Tr. 2-4) affirming the decision of the Referee. In reaching its decision the Appeals Council found, *inter alia*, that plaintiff’s services “were performed prior to the delivery of the potatoes to a terminal market,” and “as an incident to the preparation of such * * * vegetables for market.” Under the applicable regulations and practices, the decision of the Appeals Council became the final decision of the Federal Security Administrator.

Statute Involved

Section 209(a) of the Social Security Act, as amended, defines “wages” as “* * * remuneration for employment * * *”

Section 209(b) defines the term “employment” as “* * * service performed * * * by an employee for the person employing him * * * except (1)

Agricultural labor (as defined in subsection (1) of this section).”

Section 309(1) reads in patr as follows:

“The term ‘agricultural labor’ includes all service performed——

* * *

“(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.”

Argument

Point I

The Social Security Administration correctly found that plaintiff’s services rendered Albert Miller and Company in the handling of potatoes at its warehouse in Burley, Idaho, in 1941 and 1942 were excepted from employment as “agricul-

tural labor" under the Social Security Act, as amended, and that thus plaintiff was not entitled to wage credits for his earnings for such services.

Under the provisions of Section 209(1)(4) of the Social Security Act, as amended, previously quoted, the services rendered by the plaintiff constituted "agricultural labor," if such services were performed "as an incident to the preparation of such" potatoes for market, and not after the delivery of potatoes "to a terminal market for distribution for consumption."

On the question as to whether plaintiff's services in the Burley warehouse were performed as an incident to the preparation of the potatoes for market, the Referee stated his conclusion as follows:

"It is evident from the facts in this case, and the Referee finds, that potatoes handled by the company in its Burley warehouse were not fully prepared for market until they were washed and finally sorted and graded, and it is therefore the finding of this Referee that the operations of this company in its Burley warehouse were incident to the preparation of potatoes for market."

As to approximately one-half of the potatoes handled, the company purchased and paid for them on the basis of sorting and grading into U. S. No. 1's and U. S. No. 2's in the company's warehouse. As for the remaining approximately one-half of the potatoes handled, some were purchased and paid for

as a lot as they stood in the farmer's cellar, and some were purchased and paid for after sorting and grading, by the company, into U. S. No. 1's and U. S. No. 2's in the farmer's cellar. Thus most of the potatoes handled by the company at Burley, were purchased and paid for on the basis of sorting and grading into U. S. No. 1's and U. S. No. 2's. Moreover, all of the potatoes, including those which the company purchased and paid for as a lot as they stood in the farmer's cellar, had to be sorted and graded into U. S. No. 1's and U. S. No. 2's before they were ready for distribution for consumption and before they were even ready for the wholesale market. According to the additional evidence supplied by plaintiff to the Appeals Council, approximately sixty per cent of the potatoes were shipped by the company to various points in the United States upon directions emanating from the company's Chicago office, and approximately forty per cent of the potatoes were sold locally, most of the local sales being of potatoes which had been sorted and graded by the company in the farmer's cellars and not in the company's warehouse. Although legal title to the potatoes may have passed to the company before the warehouse operations started, the purchase by the company was (as to most of the potatoes handled) of U. S. No. 1 and U. S. No. 2 potatoes, in the same sense that in *Michigan Unemployment Comp. Comm. v. Unionville Milling Co.*, 313 Mich. 292, 21 N. W. 2d 135, and in *In re Lazarus*, 294, N. Y. 613 N. W. 2d 169,

the purchase of beans by elevator operators from the growers who were paid on the basis of "choice hand-picked beans," was construed to constitute the purchase of "picked" (sorted and graded) beans, the sorting and grading to be done in the elevator by employees of the elevator operator and held to constitute "agricultural labor" within the meaning of an "agricultural labor" definition which is the same as the Federal definition involved in the instant case.

That the Burley warehouse of the company was not "a terminal market for distribution for consumption" of the potatoes, would seem clear from the fact that apparently sixty per cent of the potatoes handled were shipped by the company interstate, in carload lots, to wholesalers and dealers at various points in the United States and not to retailers or consumers. At least with respect to the sixty per cent of the potatoes so handled, they had not reached their "terminal market" until they came into the hands of the wholesalers and dealers to whom the company shipped the potatoes in carload lots. And, as stated by the Appeals Council, "the operations of the Burley warehouse must be considered as a whole and the fact that sixty per cent of the potatoes bought through that warehouse were sold to wholesalers and dealers located at points far distant supports the conclusion that such points, rather than the Burley warehouse, constituted the 'terminal market' for its output, within the meaning of the Act." The facts in this case also show that the plaintiff's services were per-

formed wholly with respect to the potatoes (approximately 60% of the total handled), which were shipped in carload lots to wholesalers and dealers rather than to retailers or consumers. Hence, the evidence supports the conclusion that the plaintiff's services were performed, as "an incident to the preparation of * * * such vegetables [potatoes] for market," and not "after delivery to a terminal market for distribution for consumption," within the meaning of Section 209(1)(4).

A recently decided case involved the "agricultural labor" question as to services performed with respect to potatoes handled under facts quite similar to those in the instant case. We refer to *Janssen v. Employment Security Commission, Wyo.*, 192 P. 2d 606, in which it was held, *inter alia*, that services performed in processing, packing, and marketing potatoes grown by others and purchased by the processor, were not exempt as "agricultural labor" under the Wyoming Employment Security Law. That case was decided under a different and narrower definition of "agricultural labor" than the definition which is involved in the instant case. Significantly, however, the court clearly indicated that a contrary conclusion would have been reached if that case had involved the definition which governs the instant case. The court said (pp. 609-610):

"In 1939 Congress believed that the exemptions under the then existing law, and the regulation pursuant thereto in connection with agri-

cultural labor should be broadened because 'in the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones.' See Report 728 of the House Ways and Means Committee 76 Congress 1st Session. So Congress passed an Act on August 10, 1939, effective January 1, 1940, exempting agricultural labor from the term employment by defining the term agricultural labor to include, among others, services:

“(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.’ 26 U. S. C. A. Int. Rev. Code, sec. 1426.

“Most of the states thereafter modified their Social Security Act in conformity with the provisions of the federal act. It has been held that under the amended act no tax is due from employers under facts similar to those in the case at bar. *Cache Valley Turkey Growers Ass’n v. Industrial Commission*, 106 Utah 1, 144 P. 2d 537; *Claim of Lazarus*, 268 App. Div. 547, 52 N.Y.S. 2d 682; affirmed by an opinion in 292 N.Y. 613, 64 N.E. 2d 169; *Unemployment Compensation Commission v. Unionville Milling Co.*, 313 Mich. 292, 21 N.W. 2d 135. The legislature of Wyoming, however, refused or neglected, as noticed above, to follow the foregoing trend in legislation, and instead of enlarging exemptions from taxation in connection with agriculture took the opposite course and distinctly narrowed and limited them.”

It is apparent that the plaintiff in this case seeks to bring his services within the holding in *Miller v. Burger*, 161 F. 2d (C.C.A. 9). We believe, however, that the *Burger* case is clearly distinguishable from the present case. In the first place, the services that were involved in the *Burger* case were with respect to dried fruits, whereas the instant case involves fresh vegetables. Both the Bureau of Internal Revenue (*Em T-Coll. Mim.* 6219, Dec. 31, 1947, as modified by *Coll. Mim.* 6239, March 1, 1948), and the Social Security Administration have drawn a distinction between the handling, grading, and preparation of fresh fruits and vegetables, as compared

with the operations in processing dried fruits. The position has been taken by both agencies, that services performed in the employ of a commercial handler of fresh fruits and vegetables purchased by the handler from the farmer producer, in the handling, packing, packaging, grading, and preparation of such fresh fruits and vegetables in their raw or natural state prior to the sale thereof, or delivery thereof for shipment or sale, to a wholesaler or dealer, are excepted services under Section 209(1) (4). It may well be argued that services after the slicing, pitting, and drying of fruits in the Burger case were not incidental to the preparation of such fruits for market; whereas, the washing, sorting, and grading of potatoes, were incidental to the preparation of the potatoes for market. As pointed out by the Referee the potatoes were not ready for distribution to the consuming public prior to their washing, sorting, and grading. Indeed, the facts show that until the potatoes had been sorted and graded into U. S. No. 1's and U. S. No. 2's, they were not even ready for the wholesale market, since all of the potatoes handled by the company at its Burley warehouse were marketed by it only after sorting and grading into U. S. No. 1's and U. S. No. 2's.

Moreover, whereas in the Burger case the services were performed with respect to dried fruit which the packer had purchased outright on the basis of the condition such fruit was in at the time of such purchase, here the plaintiff's services were performed with respect to raw potatoes which Albert

Miller and Company purchased, for the most part, on the basis that it would sort and grade them into U. S. No. 1's and U. S. No. 2's and would pay the farmer on that basis; in other words, unlike in the Burger case, here the nature of the transaction was such as to show that the parties contemplated, and that the transaction required, the performance of services such as those which were performed by the plaintiff. The farmer in effect sold the potatoes to the company, not in the condition they were in at the time the company took or had the right to possession, but rather in the contemplated condition after the sorting and grading into U. S. No. 1's and U. S. No. 2's (Tr. 67, 73). The "growers' market" concept of the Burger case was predicated upon the fact that at the time of sale by the farmer producer to the commercial handler, "the farmer producer * * * parted with all of his economic interest in the fruit, its future form or destiny." In the instant case, however, there was a continuing economic interest in the potatoes by the farmer, because his return could not be measured until after the performance of the sorting and grading operations.

Point II.

Findings of the Federal Security Administrator supported by substantial evidence are conclusive.

Congress has committed the determination of rights to Title II benefits to the Federal Security Administrator. Section 205(g) of the Social Se-

cuity Act, as amended, contains the conventional limitations on judicial review of administrative decisions. It provides that the "findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive." *Walker v. Altmeyer*, 137 F. (2) 531 (C.C.A. 2); *Social Security Board v. Warren* 142 F. (2) 974 (C.C.A. 8); *Holland v. Altmeyer*, 60 F. Supp. 954 (D. Minn.); *Thompson v. Social Security Board*, 154 F. 2d 204 (App. D.C.). The finality accorded to the Administrator's findings (i.e., the findings of the Appeals Council of the Social Security Administration) by the Act extends to his inferences or conclusions so long as they are reasonably reached upon due consideration and after a hearing. The Administrator's findings are sound and unquestionably supported by substantial evidence. They are therefore binding on this Court.

In *N.L.R.B. v. Hearst Publications*, 322 U. S. 111, 130-131, the Court said:

"In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. *Labor Board v. Nevada Copper Corp.*, 316 U. S. 105; cf. *Walker v. Altmeyer*, 137 P. 2d 531 (C.C.A.). Undoubtedly questions of statutory interpretation,

especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *United States v. American Trucking Assns.*, 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251) or that he was injured 'in the course of employment' (*Parker v. Motor Boat Sales*, 314 U. S. 244) and the Federal Communications Commission's determination that one company is under the 'control' of another (*Rochester Telephone Corp. v. United States*, 307 U. S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

As stated by the court in *United States and Social Security Board v. LaLone*, 152 F. (2) 43 (C.C.A. 9),

//Under this section of the Social Security Act providing for appeals from an administrative board, as under other similar acts, the board's

findings of fact must be sustained if the court finds they are supported by substantial evidence. This same finality extends to the board's inferences and conclusions from the evidence if a substantial basis is found for them. *Gray v. Powell*, 314 U. S. 402, *Dobson v. Comm'r.* 320 U. S. 489, 501-3; *Comm'r. v. Scottish American Investment Co., Inc.*, 323 U. S. 119; *N.L.R.B. v. Hearst Publications*, 322 U. S. 111; *Walker v. Altmeyer*, 2 Cir., 137 F. (2) 531; *Social Security Board v. Warren* 8 Cir., 142 F. (2) 974."

The same principle was applied with respect to a finding by the Social Security Board (now Social Security Administration) that a wage earner's widow was not "living with" him at the time of his death. In *Thompson v. Social Security Board*, 154 F. (2d) 204, (App. D. C.), the court, in a per curiam decision, said:

"Appellant sued in the District Court to review a decision of the Social Security Board. This appeal is from a summary judgment for the Board.

"Appellant had filed with the Board a claim to insurance benefits as the widow of a wage-earner. The Board had found, on conflicting evidence, that appellant was not 'living with' the wage-earner at the time of his death and therefore was not entitled to benefits. 53 Stat. 1365, § 202 (e)(1), 42 U.S.C.A. § 402 (e)(1),

53 Stat. 1378 § 209(n), 42 U.S.C.A. § 409(n). The Board filed in the District Court a certified copy of the record, including the evidence on which the Board's findings and judgment were based. The proceedings before the court were a review of that record, not a trial de novo. Since the evidence in support of the Board's findings of fact was substantial, those findings were conclusive. 53 Stat. 1370, § 205(g), 42 U.S.C.A. § 405(g). The District Court was therefore right in entering summary judgment."

And in *Albert J. and Isabella C. Connelly v. Social Security Board, et al.*, (October 21, 1946, not reported), the District Court for the Eastern District of Kentucky, affirming the decision of the Board, said:

"The court must conclude from the record that the facts as found by the referee and approved by the Social Security Board are supported by substantial evidence and they are accordingly approved and adopted. Section 205(g) of the Act provides that upon review by the Court, 'The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive.'

"By this specific language the Congress vested the Administrative body with the responsibility of determining from the evidence the facts of this case. By that determination this Court is bound." (Citing *Gray v. Powell*, *supra*, and *Walker v. Altmeyer*, *supra*.)

In the present case the Administrator's inferences were not merely permissible from the evidence; they were compelled. See *Gardner v. R.R.B.*, 148 F. (2) 935 (C.C.A. 5), cert. den. 66 S. Ct. 331. There is no latitude for judicial reexamination of these inferences and implications by what amounts to a judicial trial de novo on the administrative record, particularly under a statute rendering findings of the Administrator conclusive if supported by substantial evidence. Cf. *Ellers v. R.R.B.*, 132 F. (2) 636, 639-640 (C.C.A. 2); *South v. R.R.B.*, 131 F. (2) 748 (C.C.A. 5), cert. den. 317 U. S. 701.

Courts may not substitute their judgment even where the evidentiary facts are undisputed. In *Gray v. Powell*, 314 U. S. 402, 412, the court said:

“Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. * * * It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.”²

The Social Security Administration, hearing the testimony and seeing the witnesses, clearly is in a more advantageous position to determine where the truth lies, and to it alone is committed the re-

²See also *Boehn v. Com'r.*, 66 S. Ct. 120.

sponsibility of determining the weight of evidence and credibility of witnesses.

In *Walker v. Altmeyer*, 137 F. (2) 531 (C.C.A. 2) the district court in a proceeding under Section 205(g) of the Social Security Act reversed the administrative finding as to employment in a case where the individual, an attorney, continued to perform services after qualifying and so was subject to loss of benefits for months in which he rendered services for wages of \$15 or more (Section 203(d) (1) of the Act, as amended, 42 U.S.C. 403 (d)(1). The Court of Appeals reinstated the Board's decision, saying (pp. 533-534):

“The facts underlying that decision which were found on substantial evidence were, of course, binding upon the district court. That is not the question this appeal raises. The error into which the court fell was not that of making new and contrary findings but of substituting new and contrary inference of its own from the found facts which led it to reverse the administrative conclusion which had been reached as to the employee status of the plaintiff. That sort of action sent beyond the power of the district court to review in such a suit as this. It was the judgment of the administrative body as to an employer-employee relationship rather than that of the court which the statute made effective provided that judgment was based upon conclusions reasonably reached upon

due consideration of all relevant issues presented after parties in interest had been given a fair hearing or a fair opportunity to be heard upon the facts and the applicable law. *Gray v. Powell*, 314 U. S. 402."

The establishment by Congress of an administrative authority with power to determine a particular question manifests an intention to rely on the expert judgment of a body "informed by experience." *N.L.R.B. v. Hearst Publications*, 322 U. S. 111, 130. The Social Security Administration in dealing daily with the old age and survivors insurance system and processing upwards of 2,000,000 insurance claims (See Blachly and Oatman, *Judicial Review of Benefactory Action*, 33 *Geo. L. J.* 1, 12, *fa.* 53) has developed a familiarity with the background and objectives of the Act, which cannot well be attained by a court in a single contact with a segment of a wage credit problem arising under the Social Security Act, in most instances under appealing circumstances inimical to the formulation of a workable general rule.

Decisions of the character involved herein go to the head of the Social Security Act. Affecting the minute details of administration, they belong uniquely to the expert tribunal established in the specialized field. There having been a fair hearing before the Social Security Administration, an opportunity for plaintiff to present his contentions to the administrative tribunal, application of the Act in a just and reasoned manner, and a rational

basis in the evidence to support the Administrator's conclusion, a court would exceed its authority if it should substitute its judgment for the judgment of the Administrator in the field entrusted to it by Congress. *Rochester Tel. Corp v. United States*, 307 U. S. 125; 146; *Gray v. Powell*, 314 U. S. 402; *Dobson v. Com'r.* 320 U. S. 489; *Walker v. Alt-meyer*, 137 F. (2) 531 (C.C.A. 2); *Social Security Board v. Warren*, 142 F. (2) 974 (C.C.A. 8).

It is respectfully submitted that the motion of defendant for a summary judgment, and for judgment affirming the decision of the Federal Security Administrator should be granted.

/s/ JOHN A. CARVER,
United States Attorney.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney.
Attorneys for Defendant.

Of Counsel:

/s/ EDWARD H. HICKEY,
Special Assistant to the
Attorney General.

/s/ JAMES B. SPELL,
Attorney, Department of
Justice.

[Endorsed]: Filed December 3, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Archie F. McLean, Burley, Idaho.

Please take notice that the undersigned will bring the motion for summary judgment filed December 8, 1948, on for hearing before this Court, in the United States Courthouse, City of Boise, Idaho, on the 6th day of July, 1945, at 10 o'clock a.m., or as soon thereafter as counsel can be heard.

You are further notified that you are required to appoint another attorney to appear for you in this cause or you may appear in person to present this matter to the Court.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for the District of Idaho,
Attorneys for Defendant.

I hereby certify that I have sent a true copy of the foregoing Notice to the plaintiff by mailing a copy thereof in envelope bearing Government frank, and addressed to him at Burley, Idaho, this 22nd day of June, 1949.

/s/ PAUL S. BOYD.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

ORDER

At the request of the plaintiff herein it is Ordered that the amended complaint may be amended and the Clerk is directed to amend by interlineation, by inserting after the words "set forth," the last words in the first paragraph, the following: "and brings this action under the provisions of Title 42, subsection (g) of section 405 U.S.C.A."

Dated this 15th day of August, 1949.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed August 15, 1949.

[Title of District Court and Cause.]

ORDER

This matter came on for hearing on motion of the defendant for summary judgment, after hearing argument of counsel and considering the briefs filed, the Court is of the opinion that the rule laid down in the case of *Miller v. Burger* 161 Fed. (2) 992 is controlling here, therefore it is Ordered that the motion for Summary Judgment be and the same is denied.

Dated August 17, 1949.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed August 17, 1949.

In the District Court of the United States for the
District of Idaho, Southern Division

Civil Action No. 2593

ARCHIE F. McLEAN,

Plaintiff,

vs.

OSCAR EWING, Federal Security Administrator,
Defendant.

JUDGMENT

This cause came on to be heard on the motion of the defendant for summary judgment and the court having considered the pleadings in the action and the certified copy of the Social Security Administration's record of the case, and the cause having been argued and considered by the court, the court finds that there is no genuine issue as to any material fact in the case and having concluded that the defendant's motion for summary judgment should be denied and that the plaintiff is entitled to judgment as a matter of law,

It Is Hereby Ordered, Adjudged and Decreed, That the defendant's motion for summary judgment be denied and that the decision of the Appeals Council of the Social Security Administration in this case, constituting the defendant's decision, be and the same is hereby reversed and the case is remanded to the Federal Security Administrator with directions to revise the wage records maintained by the Social Security Administration with

respect to the plaintiff's wages, so as to include in said wage records payments of salary to the plaintiff by Albert Miller and Company during the last calendar quarter of 1941 and during 1942, totaling \$999.03, which payments of salary the Social Security Administration had excluded on the ground that the same was paid for services performed as "agricultural labor"; and upon such remand the Federal Security Administrator shall take further proceedings not inconsistent with this judgment.

Dated this 5th day of December, 1949.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant-appellant above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain Judgment entered herein December 5, 1949.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed February 2, 1950.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR FILING
RECORD AND DOCKETING APPEAL

Defendant-appellant shows to the court as follows:

I.

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was filed herein on February 2, 1950.

II.

The Notice of Appeal was filed for the purpose of protecting the interests of the defendant-appellant until the Attorney General could determine if the appeal is to be perfected or dismissed.

III.

The Attorney General has not advised this office of its decision and the time for docketing in the Circuit Court will expire on March 14, 1950.

Wherefore, defendant-appellant moves the court for an order extending the time within which the record on appeal may be filed and the appeal docketed in the Circuit Court of Appeals until April 24, 1950.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney
for the District of Idaho.

ORDER

Upon motion of defendant-appellant, good cause appearing therefor,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, extended to April 24, 1950.

Dated this 2nd day of March, 1950.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed March 3, 1950.

[Title of Court and Cause.]

MINUTES OF JULY 6, 1949

This cause came on regularly on defendant's Motion for Summary Judgment, S. T. Lowe representing the plaintiff and Paul S. Boyd representing the defendant.

After hearing counsel, the Court took the Motion under advisement and granted plaintiff 10 days to answer defendant's brief now on file and defendant 5 days to reply.

[Title of Court and Cause.]

MINUTES OF OCT. 21, 1949

This matter having been considered by the Court on a Motion for summary judgment and the Motion for summary judgment having been denied, and counsel for the respective parties having been advised that a date would be set for final disposition of the matter and the Court having fixed a date for such hearing on Friday the 28th day of October, 1949, at 1:30 p.m. and the Court being advised that an appeal has been taken to the United States Court of Appeals from the Order denying the Motion for summary judgement, the hearing set for Friday October 28th, 1949, will be and hereby is cancelled, vacated and set aside and this Court will take no further action in this matter until the appeal is disposed of or until Ordered so to do by the Court of Appeals.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint, filed August 31, 1948.
2. Motion, filed September 24, 1948.
3. Amended Complaint, filed October 30, 1948.
4. Answer, filed December 3, 1948.
5. Motion for Summary Judgment, filed December 3, 1948.
6. Notice of Motion, filed June 22, 1949.
7. Order of the court dated August 15, 1949, filed August 15, 1949.
8. Order of the court dated August 17, 1949, filed August 19, 1949.
9. Judgment of the court dated December 5, 1949, filed December 5, 1949.
10. Notice of Appeal, filed February 2, 1950.
11. Motion and Order Extending Time for Filing Record and Docketing Appeal dated March 2, 1950, filed March 3, 1950.
12. All minutes and records of the clerk.
13. Statement of Points upon which appellant intends to rely.
14. This designation of record and proof of service.

In preparing the above record, you will please omit the title on all pleadings filed in the cause except on the Complaint, and insert in lieu thereof

“Title of the court and cause” followed by the name of the pleading or instrument and the date of filing.

You will also omit the verifications and note in lieu thereof “duly verified” if the same be verified. You will also omit the acknowledgment of service on all pleadings and other documents.

/s/ JOHN A. CARVER,
United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for
the District of Idaho.

I certify that a copy of the foregoing Designation of Record on Appeal was mailed to S. T. Lowe, plaintiff's attorney, Burley, Idaho, on this 3d day of April, 1950.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed April 3, 1950.

[Title of District Court and Cause.]

AMENDED DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action and

Defendant-Appellant, pursuant to Rule 75(h) F.R.C.P., amends Designation of Record on Appeal filed April 3, 1950, to read as follows:

1. Complaint, filed August 31, 1948.
2. Motion, filed September 24, 1948.
3. Amended Complaint, filed October 30, 1948.
4. Answer, including transcript of administrative record filed December 3, 1948. The administrative record filed with Answer is to be printed as integral part of record on appeal.
5. Motion for Summary Judgment, filed December 3, 1948.
6. Notice of Motion, filed June 22, 1949.
7. Order of the court dated August 15, 1949, filed August 15, 1949.
8. Order of the court dated August 17, 1949, filed August 19, 1949.
9. Judgment of the court dated December 5, 1949, filed December 5, 1949.
10. Notice of Appeal, filed February 2, 1950.
11. Motion and Order Extending Time for Filing Record and Docketing Appeal dated March 2, 1950, filed March 3, 1950.
12. All minutes and records of the clerk.

13. Statement of Points upon which appellant intends to rely.

14. The Designation of Record on Appeal, filed April 3, 1950, and proof of service.

15. This Amended Designation of Record on Appeal and proof of service.

In preparing the above record, you will please omit the title on all pleadings filed in the cause except on the Complaint, and insert in lieu thereof "Title of the court and cause" followed by the name of the pleading or instrument and the date of filing. You will also omit the verifications and note in lieu thereof "duly verified" if the same be verified. You will also omit the acknowledgment of service on all pleadings and other documents.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

I certify that a copy of the foregoing Amended Designation of Record on Appeal was mailed to S. T. Lowe, plaintiff's attorney, Burley, Idaho, on this 13th day of April, 1950.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed April 13, 1950.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the following papers are that portion of the original files as designated by the parties and as are necessary to the appeal under Rule 75 (RCP) :

1. Complaint, filed Aug. 31, 1948.
2. Motion, filed Sept. 24, 1948.
3. Amended Complaint, filed Oct. 30, 1948.
4. Answer, filed Dec. 3, 1948.
5. Motion for Summary Judgment, filed Dec. 3, 1948.
6. Notice of Motion, filed June 22, 1948.
7. Order, filed Aug. 15, 1949.
8. Order, filed Aug. 17, 1949.
9. Judgment, filed Dec. 5, 1949.
10. Notice of Appeal, filed Feb. 2, 1950.
11. Motion and Order Extending Time for Filing Record and Docketing Appeal, filed Mar. 3, 1950.
12. Minutes of the Court of July 6, 1949, and Oct. 21, 1949.
13. Designation of Record on Appeal, filed Apr. 3, 1950.
14. Amended Designation of Record on Appeal, filed Apr. 13, 1950.

(The original Statement of Points as requested in the Designation of Record on Appeal, Item 13, was filed in the Circuit Court and not in the District Court and, therefore, is not included in this transcript.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of this court, this 14th day of April, 1950.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 12523. United States Court of Appeals for the Ninth Circuit. Oscar Ewing, Federal Security Administrator, Appellant, vs. Archie F. McLean, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed April 17, 1950.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

OSCAR EWING, Federal Security Administrator,
Appellant,

vs.

ARCHIE F. McLEAN,

Appellee.

STATEMENT OF POINTS UNDER RULE 19

Comes Now the above-named appellant and files its statement of points on which it will rely on the appeal of this matter:

I.

The court erred in failing to hold that the services performed by the wage earner, Archie F. McLean, for Albert Miller & Company, a Chicago corporation, at its Burley, Idaho, warehouse were properly considered by the Federal Security Administrator to be "agricultural labor" as defined in Section 209 (1)(4) of the Social Security Act, as amended (42 U.S.C. 409 (1)(4) and in the corresponding tax statute, Chapter 9A of the Internal Revenue Code, 26 U.S.C. 1426(h)(4) so that the payments he received therefor during the last calendar quarter of 1941 and during 1942 were properly excluded from wage credits.

II.

The court erred in failing to hold that plaintiff's services were performed prior to the delivery of

the potatoes to a terminal market and as an incident to the preparation of such potatoes for market.

III.

The court erred in holding that the Burley, Idaho, warehouse of Albert Miller & Co. was a terminal market for distribution for consumption.

IV.

The court erred in holding that the plaintiff's services were performed after the potatoes had reached the (a) grower's market or (b) the terminal market.

V.

The court erred in failing to hold that the washing, sorting and grading operations performed by plaintiff at the Burley, Idaho, warehouse were performed as an incident to the preparation of such potatoes for market within the meaning of Section 209(1)(4) of the Social Security Act, as amended by 53 Stat. 1377, and within the meaning of the Social Security Administration Regulations 3, Part 403, Title 20 C.F.R. Sec. 403.808(e).

VI.

The court erred in concluding that the decision of the Ninth Circuit Court of Appeals in *Miller v. Burger*, 161 F. (2d) 992, dealing with the workers of a commercial handler purchasing fruit outright, is controlling here, where the washing, sorting and grading of the potatoes was incident to their preparation for market and was necessarily performed by plaintiff as the statutory agent of the

farmer grower prior to completion of which operations title to the potatoes remained in the farmer grower.

VII.

The court erred in substituting its own views of "agricultural labor" for the statutory definition adopted by Congress for Title II of the Social Security Act and corresponding tax provisions.

VIII.

The court erred in disregarding the Federal Security Administrator's findings and finding independently and without support in the record that when the Burley, Idaho, warehouse of Albert Miller & Co. received the unwashed, unsorted and ungraded potatoes that they were then in a merchantable state and that the farmer growers had parted with all economic interest and title therein.

IX.

The court erred in holding that the Social Security Act makes no distinction between the farmer growers of fresh vegetables and the commercial handlers thereof, insofar as the latter performs for such farmer-grower services incident to the preparation of such vegetables for market (a) thereby nullifying the exception of services such as washing, sorting and grading, incident to the preparation of vegetables for market, without regard to the Congressional purpose as established by the legislative history of the 1939 amendments to the Social Security Act and to the respect due the ex-

pertness of the Federal Security Administrator, and (b) invalidating the Regulations promulgated by the Social Security Administration.

X.

The court erred in holding that Albert Miller & Co. was not the statutory agent of the farmer grower for the performance of the washing, sorting and grading operations.

XI.

The court erred in denying defendant's motion for summary judgment and in reversing and remanding the cause.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed April 17, 1950.

[Title of Court of Appeals and Cause.]

ADOPTION OF POINTS AND DESIGNATION
OF RECORD FOR PRINTING

Comes Now the above-named appellant and, in compliance with Rule 19, Subdivision 6, hereby adopts as its points the Statement of Points filed in the Circuit Court of Appeals for the Ninth Circuit and appellant hereby designates the entire transcript of record and Statement of Points for printing as provided in said rule.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

I certify that a copy of the foregoing Adoption of Points and Designation of Record for Printing was mailed to S. T. Lowe, plaintiff's attorney, Burley, Idaho, on this 25th day of April, 1950.

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed April 28, 1950.

No. 12523

United States
Court of Appeals
For the Ninth Circuit.

OSCAR EWING, Federal Security Administrator,
Appellant,

vs.

ARCHIE F. McLEAN,
Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
for the District of Idaho,
Southern Division.

FILED

SEP 6 - 1950

PAUL P. O'BRIEN, CLERK

No. 12523

United States
Court of Appeals
For the Ninth Circuit.

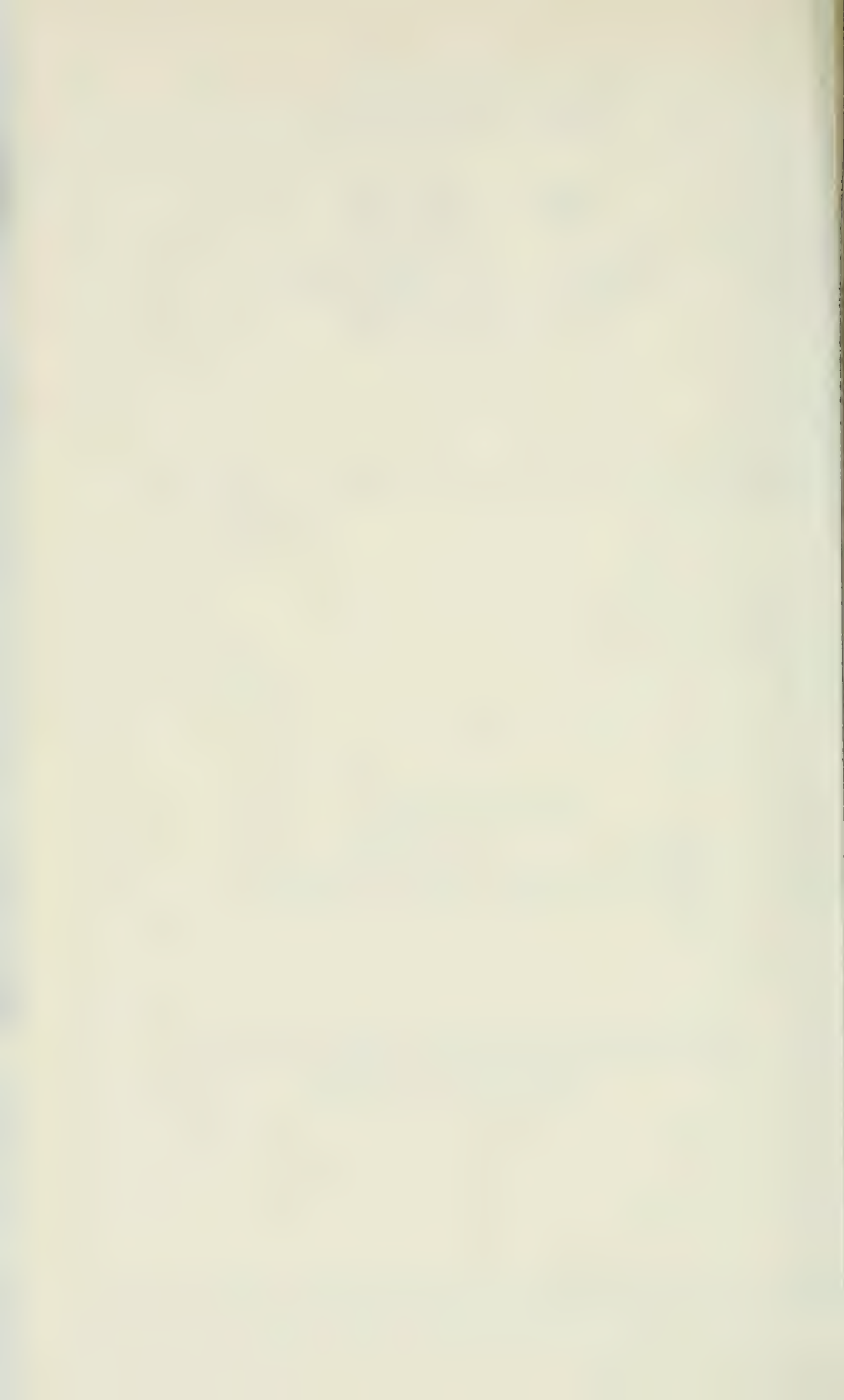
OSCAR EWING, Federal Security Administrator,
Appellant,

VS.

ARCHIE F. McLEAN,
Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
for the District of Idaho,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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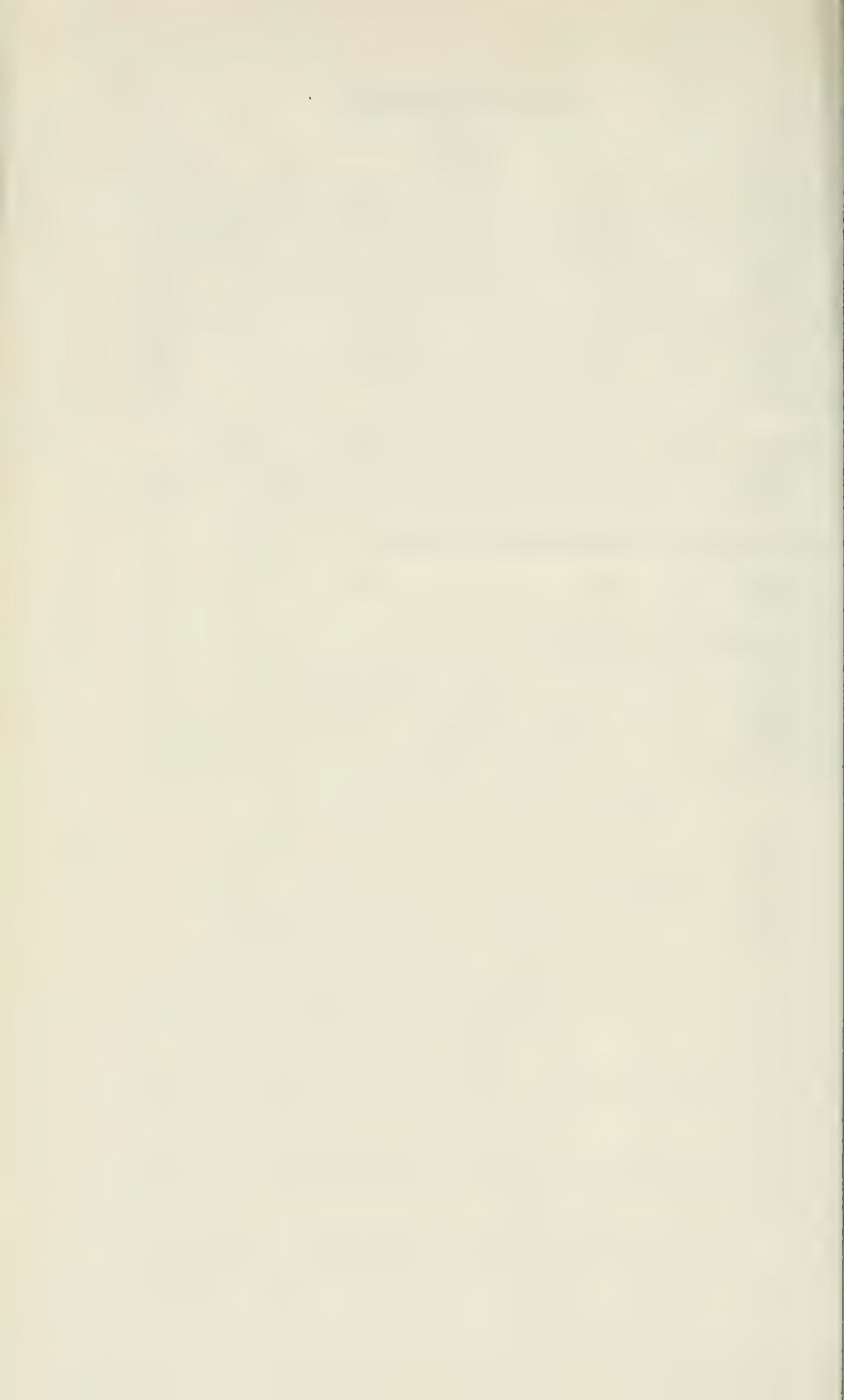
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District Court of the United States for the District
of Idaho, Southern Division

Civil Action No. 2593

ARCHIE F. McLEAN,

Plaintiff,

vs.

OSCAR EWING,

Defendant.

CERTIFICATION OF FEDERAL SECURITY
ADMINISTRATOR

I, Joseph E. McElvain, Chairman, Appeals Council, Social Security Administration, Federal Security Agency, under authority conferred upon me by the Federal Security Administrator, hereby certify that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Archie F. McLean (plaintiff herein) for primary insurance benefits under Title II of the Social Security Act, as amended, and more specifically for a revision of his wage record based on services rendered by such claimant for Albert Miller and Company at Burley, Idaho. Such transcript includes the application for benefits, testimony and evidence upon which the decisions of the referee and the Appeals Council of the Social Security Administration were based.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of letter dated July 2, 1948, addressed to claimant enclosing copy of Decision of Appeals Council.

(2) Copy of Decision of Appeals Council.

(3) Copy of Receipt of Additional Evidence.

(4) Copy of letter from claimant dated January 7, 1948, to Appeals Council. (Exhibit AC-1.)

(5) Copy of Affidavit subscribed and sworn to by James Allen Fitts. (Exhibit AC-2.)

(6) Copy of letter from claimant dated April 20, 1948, to Chairman of the Appeals Council.

(7) Copy of Affidavit subscribed and sworn to by Horace A. Knight. (Exhibit AC-3.)

(8) Copy of Affidavit subscribed and sworn to by J. W. Anderson. (Exhibit AC-4.)

(9) Copy of Designation of Member of Appeals Council to Receive Additional Evidence.

(10) Copy of letter from Chairman, Appeals Council dated April 8, 1948, addressed to claimant acknowledging receipt of and granting request for review of Referee's Decision.

(11) Copy of Order Extending Time Within Which to File Request for Review of Referee's Decision.

(12) Copy of Request for Review of Referee's Decision.

(13) Copy of letter from referee dated July 8, 1946, addressed to claimant enclosing copy of Decision of Referee.

(14) Copy of Referee's Decision.

(15) Copy of Amended Notice of Hearing.

(16) Copy of Notice of Hearing.

(17) Copy of Request for Hearing.

(18) Copy of Transcript of Hearing held on March 26, 1946.

The following documents are attached to the above-mentioned transcript as exhibits introduced in evidence before the referee:

(19) Copy of letter to Social Security Board from claimant dated April 17, 1944. (Exhibit A.)

(20) Copy of letter to claimant from Social Security Board dated June 7, 1944. (Exhibit B.)

(21) Copy of letter to Social Security Board from claimant dated September 2, 1944. (Exhibit C.)

(22) Copy of letter to Social Security Board from claimant dated February 24, 1945. (Exhibit D.)

(23) Copy of letter to claimant from Social Security Board dated March 6, 1945. (Exhibit E.)

(24) Copy of letter to Social Security Board from claimant dated September 30, 1945. (Exhibit F.)

(25) Copy of letter to claimant from Social Security Board dated October 12, 1945. (Exhibit G.)

(26) Copy of Application for Wage Earner's Primary Insurance Benefits dated October 22, 1945. (Exhibit H.)

(27) Copy of Terminal [Market] Questionnaire dated October 22, 1945. (Exhibit I.)

(28) Copy of Request for Reconsideration dated October 22, 1945. (Exhibit J.)

(29) Copy of letter to claimant from Social Security Board dated November 19, 1945. (Exhibit K.)

(30) Copy of Depositions of Marie C. Buckholz and Louise Franden and Exhibit D-1 attached thereto. (Exhibit L.)

(31) Copy of letter addressed to referee by claimant dated June 11, 1946. (Exhibit M.)

See also copies of letters from Referee, Oscar M. Sullivan, to Albert Miller & Company dated May 13, 1946, and May 3, 1946, respectively, and shown at pages 55 and 56 herein and also copy of Notice of Taking Deposition which was given to the claimant shown at page 57. (The aforesaid pages 55, 56 and 57 are shown in the attached record between Exhibit K and L.)

In Witness Whereof, I have hereunto set my hand and caused the seal of the Federal Security Agency to be affixed in the City of Washington, Dis-

trict of Columbia, this 14th day of October, 1948. By direction of the Federal Security Administrator.

[Seal] /s/ JOSEPH E. McELVAIN,
Chairman, Appeals Council, Social Security Administration, Federal Security Agency.

09:AC

Federal Security Agency
Social Security Administration
Washington

July 2, 1948

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Mr. Archie F. McLean,
114 N. Miller Street,
Burley, Idaho.

Dear Mr. McLean:

There is enclosed herewith a copy of the decision of the Appeals Council on your claim for a revision of your wage record. This decision affirms that of the referee which held that your services for Albert Miller and Company in its Burley warehouse were excepted from employment as agricultural labor and that the wage records kept by the Board (now Administration) shall not be revised to include therein salary received by you for services rendered for the said company in the years 1941 and 1942.

It is believed that the conclusion reached is clearly explained in the enclosed decision. If, however, you have any question with respect to this decision, it is suggested that you contact the nearest field office of the Bureau of Old-Age and Survivors Insurance, Social Security Administration, Federal Security Agency.

If you disagree with the enclosed decision and desire a review of the same, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended.

Sincerely yours,

JOSEPH E. McELVAIN,
Chairman.

Enclosure

co-Referee Tieburg,
F. O. Twin Falls, Idaho.

Registered 740938. [1*]

* Page numbering appearing at top of page of original certified Transcript of Record.

Federal Security Agency
Social Security Administration
Office of Appeals Council

Case No. 11-126

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Wage Record Revision.

DECISION OF APPEALS COUNCIL

This case is before the Appeals Council on the request of the claimant, Archie F. McLean, for review of the decision rendered on July 8, 1946, by Martin Tieburg, Referee. For good cause shown the Appeals Council granted the claimant, on April 8, 1948, an extension of time within which to file his request for such review. Evidence in addition to that which was before the referee, and which appears to have been unavailable at the time of the referee's hearing, has been received by the Appeals Council and introduced in the record.

In his decision the referee held that the claimant's wage record should not be revised to include remuneration paid him for services he had rendered for Albert Miller and Company. The referee's conclusion was based upon his finding that the services in question were excepted from "employment" as agricultural labor under the provisions of section

209(1) (4) of the Social Security Act, as amended. Such finding, in turn, was based upon the referee's findings that (1) the warehouse of the company in Burley, Idaho, where the claimant was employed, did not constitute a "terminal market," within the meaning of that section of the Act and (2) that the operations performed by the company in its Burley warehouse were performed "as an incident to the preparation of such . . . vegetables [i.e., potatoes] for market," within the meaning of that section. The claimant's contention to the contrary presents the issue before the Appeals Council.

The substance of pertinent sections of the Act is stated in the referee's decision and will not be repeated here. Except as noted below, the referee's statement of facts as set forth in his decision is hereby adopted and included herein by reference. The referee stated that all of the company's sales activities were carried on out of its [2] Chicago office and that all sales were made in carload lots; that cars were loaded in Burley, Idaho, and shipped either directly to jobbers in various cities of the United States or to the company's Chicago warehouse, shipping instructions sometimes being changed while cars were in transit; that "practically none of the potatoes shipped out of the Burley warehouse were consigned to retailers." The evidence received by the Appeals Council subsequent to the referee's decision indicates that approximately sixty per cent of the potatoes which were purchased locally by the management of the com-

pany's warehouse in Burley, Idaho, were shipped to various points in the United States upon directions received from the company's Chicago office and that approximately forty per cent of such potatoes were sold by the manager of the Burley warehouse, under general authority given him by the company, to local produce companies, local, intrastate, and interstate transportation companies, restaurants, stores, and private individuals; that most of the potatoes which were sold locally from the warehouse had been purchased directly from the growers, having been sorted and graded in the growers' cellars and were not washed or sorted in the warehouse.

The additional evidence just described was submitted by the claimant for the purpose of establishing that the Burley warehouse where he was employed was a "terminal market," it being his contention, apparently, that such conclusion is required by the fact that an appreciable portion, namely, forty per cent, of the potatoes purchased for the company by the Burley warehouse management was sold locally rather than being shipped directly or indirectly (i.e., through the company's Chicago warehouse) to wholesalers or dealers elsewhere for subsequent resale. In our opinion, the operations of the Burley warehouse must be considered as a whole and the fact that sixty per cent of the potatoes bought through that warehouse were sold to wholesalers and dealers located at points far distant supports the conclusion that such points, rather than the Burley warehouse, constituted the "terminal

market” for its output, within the meaning of the Act. If it is considered proper to consider the local sales made at Burley separately from the total, it would seem also that consideration should be given to the fact, which is established by the record, that the services performed by the claimant, as stated in the referee’s decision, “consisted of approximately forty-five per cent in washing operations and fifty-five per cent in grading operations at the Burley warehouse.” Since the new evidence submitted by the claimant shows that neither of these operations was performed in the warehouse respecting potatoes sold locally, the conclusion would seem to be inevitable that his services related solely to the potatoes (sixty per cent of the total handled) which were shipped directly or indirectly to wholesalers and dealers located at distant [3] points from Burley, Idaho, and that his services, therefore, were performed prior to the delivery of the potatoes to a terminal market, and “as an incident to the preparation of such . . . vegetables for market.”

It is the position of the Social Security Administration that the handling, packing, packaging, grading, and preparing of fresh fruits and fresh vegetables in their raw or natural state prior to the sale thereof, or delivery thereof for shipment or sale, to a wholesaler or dealer, in the employ of commercial handlers who purchase the fruits or vegetables from the producer, are excepted services is under section 209(1)(4) of the Act. In the light of the facts as established by the record in this case and as set

forth in the foregoing statement and in the referee's decision, the finding of the referee that the services performed by the claimant for Albert Miller and Company in its Burley, Idaho, warehouse, were excepted from employment as agricultural labor is hereby adopted, and the referee's decision that the wage records kept by the Board (now Administration) shall not be revised to include therein remuneration paid the claimant for services rendered by him for the said company in the years 1941 and 1942 is hereby affirmed.

Date: July 2, 1948.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman. [4]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Case No. 11-126

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Wage Record Revision.

RECEIPT OF ADDITIONAL EVIDENCE

The above case having been referred to me by the Appeals Council for the receipt of additional evidence, which consists of a letter, dated January 7, 1948, from Archie F. McLean addressed to Social Security Agency, Social Security Board, Office of Appeals Council, c/o Twin Falls Social Security Agency, Twin Falls, Idaho; an affidavit signed by James Allen Fitts, dated January 7, 1948; an affidavit signed by Horace A. Knight, dated April 20, 1948; and an affidavit signed by J. W. Anderson, dated April 14, 1948, designated Exhibits AC-1, AC-2, AC-3, and AC-4, respectively, the same is hereby received by me and made a part of the record of this case.

Date: April 30, 1948.

/s/ ERNEST R. BURTON,
(Title) Member, Appeals Council. [5]

Case No. 11-126

Exhibit AC-1

January 7, 1948

Social Security Agency,
Social Security Board,
Office of Appeals Council,
c/o Twin Falls Social Security Agency,
Twin Falls, Idaho.

Re: Archie F. McLean, Claimant,
SS No. 518-18-1969,
Case No. 11-126.

Gentlemen:

I have discovered new evidence which is pertinent to the Referee's decision rendered by Martin Tieburg, Referee, dated July 8, 1946. I have found the Social Security Board and Appeals Council fair and reasonable in their decisions and because of this I am sure that based upon the newly discovered evidence, that you will reconsider my case and reopen the same for a hearing of this new evidence. To support this evidence, I am submitting at this time an Affidavit by James Allen Fitts, which substantiates the showing that my employment at the Albert Miller and Co., at Burley, Idaho, was covered employment, and further that the warehouse of said Albert Miller and Co., where I was employed at Burley, was a terminal warehouse, and therefore my employment should not be excepted from the Security Act. The essential question at

the last hearing was whether or not the Burley warehouse of the Company was a terminal market. I can substantiate by direct evidence through Mr. Fitts' testimony that the same is a terminal market and the Affidavit is submitted in support of this contention.

This evidence was not introduced by me at the original hearing because I didn't understand the amended portion of the Security Act relative to this type of employment, and further that I was not informed of the exact transaction engaged in by the Burley warehouse of the Company, and further that Mr. Fitts was not in or around Burley at the time, but since his return to Burley, this evidence has been called to my attention.

I respectfully request that based upon this information, that I be granted a re-hearing for the reasons above outlined.

Very truly yours,

/s/ ARCHIE F. McLEAN,
Claimant. [6]

Case No. 11-126

Exhibit AC-2

518-18-1969

AFFIDAVIT OF JAMES FITTS

State of Idaho,
County of Cassia—ss.

James Allen Fitts, being first duly sworn, deposes
and says :

That he is a citizen of the United States; that he has been a resident of the State of Idaho for approximately 40 years; that he has been a resident of Cassia County, State of Idaho, for approximately 19 years; that at various times of his life he has been employed as Manager for produce companies and has acted individually as a produce buyer and shipper and has further been produce inspector for the United States Government for approximately 15 years; that because of such experience and background, he was and is qualified as an office manager, produce buyer and seller; that for approximately 4 years he was employed by the Albert Miller and Co., a foreign corporation, at Burley, Cassia County, State of Idaho, as Warehouse Manager, which position entailed the buying, transporting, washing, sorting, storing, selling and shipping of potatoes and all other incidentals including office management of the said warehouse at Burley, Idaho, for said Albert Miller and Co.; that such position further entailed the employing and discharging of employees neces-

sary for the continuance of said produce operation;

And further, that affiant was employed by said Albert Miller and Co., during the months of November and December, 1941; January, February, March, April, May, September, October and November, 1942; that during the above-mentioned months and at all times while he was employed by said Albert Miller and Co., affiant was authorized by said Albert Miller and Co., to purchase potatoes and to sell potatoes; that approximately 60% of the potatoes which he purchased for the Albert Miller and Co. were shipped to various points in the United States upon directions emanating from the Albert Miller and Co., at Chicago, Illinois; that affiant followed said instructions and shipped said potatoes upon receiving orders from said company. However, approximately 40% of said potatoes which he purchased and which were sorted in the farmers' cellars, by and for the Albert Miller and Co., were sold from the warehouse at Burley, Idaho, by this affiant to local produce companies, local and interstate as well as intrastate transportation companies, stores, restaurants, and private individuals; and further, that the majority of the potatoes which were sold by the affiant locally were potatoes which had been purchased from farmers and which had not been washed nor sorted in the warehouse of the Albert Miller and Co., warehouse, at Burley, Idaho, being potatoes which were purchased directly from the farmer and having been sorted and graded in the farmer's

cellar; Affiant further states that he was empowered and authorized by the Albert Miller and Co. to so sell said potatoes locally, the price being left to the judgment of this affiant by said Albert Miller and Co.; and further, affiant states that in his selling of potatoes locally for the Albert Miller & Co., he was not only authorized but encouraged to so sell the said potatoes, by the authorities of the Albert Miller and Co.;

Affiant further states that during the above-mentioned months, while he was employed as Manager of the Burley warehouse for the Albert Miller and Co., there was employed at said warehouse at Burley, Idaho, one Archie F. McLean; that the said Archie F. McLean was employed as labor during the said months by said Company and was paid by said Company appropriate wages for the services rendered to the said Albert Miller and Co.; that Archie F. McLean worked in and about the warehouse and assisted in various types of jobs therein.

Dated this 7th day of January, 1948.

/s/ JAMES ALLEN FITTS.

Subscribed and sworn to before me this 7th day of January, A.D. 1948.

/s/ DEAN KLOEPFER,

Notary Public in and for the State of Idaho, Residing at Burley, Idaho. [7]

114 N. Miller St.,
Burley, Idaho,
April 20, 1948.

Mr. Joseph E. McElvain, Chairman,
Federal Security Agency,
Social Security Administration,
Washington 23, D. C.

Re: File No. 09:AC

In the case of Archie F. McLean, Claimant and
Wage Earner,
Social Security Account No. 518-18-1969

Dear Mr. McElvain:

Regarding your letter of April 8, 1948, I am requesting that the Appeals Council proceed with the review of my case. Enclosed you will find two Supplemental Affidavits relative to the subject matter involved. I request that the Appeals Council consider the same. The Affidavits could not be obtained prior to this time as the affiants were not in and around Burley and a search by me finally disclosed their whereabouts and the said Affidavits were then obtained.

I further request that the Council consider my case on the information before them, as it is impossible for me to appear in person or to employ counsel. Kindly keep me advised.

Very truly yours,

/s/ ARCHIE F. McLEAN. [8]

AFFIDAVIT OF HORACE A. KNIGHT

State of Idaho,
County of Cassia—ss.

Horace A. Knight, being first duly sworn, deposes and says:

That he is a citizen of the United States; that he has been a resident of the State of Utah, County of Weber, for approximately 47 years; that at various times in his life he has been engaged in the business of produce buyer and generally dealing in the produce business for the past 25 years;

Further, Affiant states that during the months of November and December, 1941, January, February, March, April, May, September, October and November, 1942, he purchased at various times from the Albert Miller and Co. several truck loads of potatoes; that affiant knows that the local office, located at Burley, Idaho, from which he purchased said potatoes, of the Albert Miller and Co., was authorized to purchase and sell potatoes;

Affiant further states of his own knowledge that during the above-mentioned months, during which he at various times purchased potatoes from the Albert Miller and Co. warehouse at Burley, Idaho, that there was employed at said warehouse at Burley, Idaho, one Archie F. McLean; that the said Archie F. McLean was employed as a laborer during

the said months by said Company and was paid by said Company appropriate wages for the services rendered to the said Albert Miller and Co.; that the said Archie F. McLean worked in and about the warehouse and assisted in various types of jobs therein.

Dated this 20th day of April, A.D. 1948.

/s/ HORACE A. KNIGHT.

Subscribed and sworn to before me this 20th day of April, A.D. 1948.

/s/ DEAN KLOEPFER,

Notary Public in and for the State of Idaho, Residing at Burley, Idaho.

My commission expires March 19, 1949. [9]

Case No. 11-126

Exhibit AC-4

AFFIDAVIT OF J. W. ANDERSON

State of Idaho,

County of Cassia—ss.

J. W. Anderson, being first duly sworn, deposes and says:

That he is a citizen of the United States; that he has been a resident of the State of Idaho for approximately 30 years, and a resident of Cassia County, Idaho, for approximately 30 years; that at various times in his life he has been employed as foreman, produce buyer and generally dealing in the produce business, for several produce companies during the last 25 years; that for approximately 10 years he was employed by the Albert Miller and Co., a foreign corporation, at Burley, Cassia County, Idaho, as foreman, in charge of the warehouse, sorting, loading of cars, loading trucks and general duties as a warehouse foreman; that affiant was well qualified for the duties of a warehouse foreman;

Further, affiant was employed by said Albert Miller and Co. during the months of November and December, 1941, January, February, March, April, May, September, October and November, 1942; that during the above-mentioned months and at all times while he was employed by said Albert Miller and Co., at Burley, Idaho, affiant knows that the local office at Burley was authorized by the Albert Miller

and Co. to purchase potatoes and to sell potatoes; that approximately 60% of the potatoes which were purchased locally for the Albert Miller and Co. were shipped to various points in the United States upon directions emanating from the Albert Miller and Co., at Chicago, Illinois; that instructions were followed and potatoes were shipped upon receiving orders from the said Company; that approximately 40% of said potatoes which were purchased and which were sorted in the farmers' cellars, by and for the Albert Miller and Co., were sold from the warehouse at Burley, Idaho, by the Burley warehouse to local produce companies, local and interstate as well as intrastate transportation companies, restaurants, stores and private individuals; that further, the majority of the potatoes which were sold by the Burley warehouse locally were potatoes which had been purchased from farmers and which had not been washed nor sorted in the warehouse of the Albert Miller and Co. warehouse at Burley, Idaho, being potatoes which were purchased directly from the farmers and having been sorted and graded in the farmers' cellars; Affiant further states that he knows that the local Manager was empowered and authorized by the Albert Miller and Co. to so sell said potatoes locally, the price being left to the judgment of said Manager by the said Albert Miller and Co.; and further, affiant states that in selling of potatoes locally for the said Albert Miller and Co., the Manager was not only authorized to so sell the said potatoes, but was also encouraged by the

said Albert Miller and Co., in the selling of the potatoes locally;

Affiant further states that during the above-mentioned months, during which he was employed as warehouse foreman of the Burley warehouse for the Albert Miller and Co., there was employed at said warehouse at Burley, Idaho, one Archie F. McLean; that the said Archie F. McLean was employed as laborer during the said months by said Company and was paid by said Company appropriate wages for the services rendered to the said Albert Miller and Co.; that the said Archie F. McLean worked in and about the warehouse and assisted in various types of jobs therein.

Dated this 14th day of April, A.D. 1948.

/s/ J. W. ANDERSON.

Subscribed and sworn to before me this 14th day of April, 1948.

/s/ DEAN KLOEPFER,

Notary Public in and for the State of Idaho, Residing at Burley, Idaho.

My commission expires March 19, 1949. [10]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Case No. 11-126

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Wage Record Revision.

DESIGNATION OF MEMBER OF APPEALS
COUNCIL TO RECEIVE ADDITIONAL
EVIDENCE

It appearing that there is available additional material evidence in connection with the above case which may affect the decision of the Appeals Council, Ernest R. Burton, Member of the Appeals Council, is hereby appointed to receive the offered evidence, and to make same a part of the record in this case.

Date: April 30, 1948.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman. [11]

09:AC

Federal Security Agency
Social Security Administration
Washington

April 8, 1948

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Mr. Archie F. McLean,
114 N. Miller Street,
Burley, Idaho.

Dear Mr. McLean:

This acknowledges receipt of your request for review of the decision rendered by Mr. Martin Tieburg, the referee who conducted the hearing on your claim for revision of Board's wage records. The Appeals Council grants your request for review.

The regulations of the Social Security Administration, Federal Security Agency, provide that you may, if you desire, appear and discuss your case before the Appeals Council, in Washington, D. C., in person or by someone whom you appoint to represent you. You may also file with the Council a brief or other written statement of your contentions. You are not required, however, to appear before the Appeals Council or to submit a brief or other statement, and the merits of your case will receive the same careful consideration by the Coun-

cil whether you appear before it or submit a statement or do neither.

If you decide to appear before the Appeals Council in person, or by a representative, please advise by letter within fifteen days so that we can notify you of the date when the Appeals Council will hear your argument. If you file a brief, it should be mailed to this office within twenty days from the date of this notice.

The decision of the Appeals Council will be based upon the record unless additional evidence is accepted. Such additional evidence, however, will not be accepted or considered by the Appeals Council unless there is a good showing beforehand that it is material and may affect the Council's decision.

Sincerely yours,

JOSEPH E. McELVAIN,
Chairman.

cc—Referee Tieburg,

F. O., Twin Falls, Idaho. [12]

Federal Security Agency
Social Security Administration
Office of Appeals Council
Case No. 11-126

ORDER EXTENDING TIME WITHIN WHICH
TO FILE REQUEST FOR REVIEW OF
REFEREE'S DECISION

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Revision of Board's Wage Records.

It appearing from a letter dated January 7, 1948, addressed to the Office of the Appeals Council and signed by the claimant, Archie F. McLean, that he is able at this time to present additional material evidence which was unavailable at the time of the hearing held before the referee and that he wishes the referee's decision which was rendered on July 8, 1946, to be reviewed by the Appeals Council in the light of such additional evidence, it is the conclusion of the Appeals Council that the time for filing a request for review of the referee's decision should be extended, and the claimant's request for review which was filed with the San Francisco, California, area office on March 25, 1948, is hereby accepted.

OFFICE OF APPEALS
COUNCIL,
/s/ JOSEPH E. McELVAIN,
Chairman.

Date: April 8, 1948. [13]

Federal Security Agency
Social Security Board
Office of Appeals Council

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Primary Insurance Benefits.

REQUEST FOR REVIEW OF REFEREE'S
DECISION

To the Appeals Council:

I disagree with the referee's decision on the above claim and request that the Appeals Council review it.

Remarks: (If you wish you may use this space for statement of reasons for disagreement.)

The claimant states in a letter addressed to the Social Security Administration dated January 7, 1948:

"I have discovered new evidence which is pertinent to the Referee's decision rendered by Martin Tieburg, Referee dated July 8, 1946. I have found the Social Security Board and Appeals Council fair and reasonable in their decisions and because of this I am sure that based

upon the newly discovered evidence that you will re-consider my case.”

“* * *”

ARCHIE F. McLEAN.

Date: Jan. 8, 1948.

Acknowledgment of Request for Review of
Referee's Decision

Your request for review of the referee's decision in this case was filed on March 25, 1948, at San Francisco, Calif.

The Chairman of the Appeals Council will notify you of the Council's action on your request.

(For the Social Security Board.)

By /s/ JOSEPH C. COLUMBUS,
Chief, Area Office,
San Francisco, Calif.

To: Archie F. McLean,
114 N. Miller St.,
Burley, Idaho. [14]

09:AC

09:RO:XII

Case No. 11-126

NOTICE OF DECISION

785 Market Street,
San Francisco 3, California,
July 8, 1948.

Mr. Archie F. McLean,
114 North Miller,
Burley, Idaho.

Dear Mr. McLean:

Enclosed is a copy of my decision in your case which is that the wage records kept by the Board shall not be revised to include therein salary received by you for services rendered for Albert Miller and Company.

If you disagree with my findings of fact or application of the law, as stated in this decision, you may request that it be reviewed by the Appeals Council of the Social Security Board. Such request, however, must be made in writing and filed within thirty days from the date of this letter, and may be filed at any field office of the Social Security Board.

If you have any question about this decision, or desire further information regarding its review, I

suggest that you write to or call at the nearest field office of the Social Security Board.

Sincerely yours,

/s/ MARTIN TIEBURG,
Referee.

Enclosure:

cc—Appeals Council, Washington, D. C.
San Francisco Area Office
Field Office, Twin Falls, Idaho
Referee Sullivan [15]

Federal Security Agency
Social Security Board
Office of Appeals Council
Case No. 11-126

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Revision of Board's Wage Records.

REFEREE'S DECISION

Archie F. McLean, claimant herein, disagreed with a determination of the Bureau of Old-Age and Survivors Insurance of the Social Security Board whereby wage credits for certain services were disallowed, and filed a request for a hearing before a

referee of the Social Security Board. Such a hearing was held in Burley, Idaho, on March 26, 1946, before the undersigned referee. Claimant was present and participated in the hearing. Thereafter, and on May 22, 1946, a deposition was taken before Referee Oscar M. Sullivan in Chicago, Illinois, at which deposition Marie C. Buckholz and Louise Franden were the witnesses, and said deposition was thereafter introduced into the record of this matter.

The claimant instituted these proceedings as a wage revision proceeding on September 2, 1944. Thereafter, and in 1945, he filed an application for primary insurance benefits for the purpose of freezing his wage record. This latter application was never acted upon, as it was neither allowed nor disallowed by the Bureau. Under such circumstances the referee will devote this decision to a determination of the question of coverage of certain services rendered by the claimant for the Albert Miller and Company in 1941 and 1942, and will not make a determination on the fully insured status of the claimant. Such limitation of this decision will nowise affect the claimant generally, as the record discloses that even if these services were held to be in covered employment and credit given therefor, in addition to the other credits which the claimant already has on his wage record, they would not constitute him a fully insured individual at the time of the hearing in this matter, since he required approximately 17 quarters of coverage for a fully insured

status and had only 11 in addition to those in question here which total only 5.

The claimant contends that his services for Albert Miller and Company were rendered in covered employment and were not excepted from employment as agricultural labor. That presents the issue before the referee. [16]

Section 209(a) of the Social Security Act, as amended, defines "wages" as "... remuneration for employment. . . ."

Section 209(b) defines the term "employment" as "... service performed . . . by an employee for the person employing him . . . except—(1) Agricultural labor (as defined in subsection (1) of this section)."

Section 209(1) reads in part as follows:

"The term 'agricultural labor' includes all service performed—

* * *

"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vege-

tables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption."

The claimant in the month of November, 1941, commenced rendering services for Albert Miller and Company in its Burley, Idaho, warehouse or packing shed. The Albert Miller and Company, a corporation, had its principal office in Chicago, Illinois, and is designated as a "carlot potato distributor." All of its sales activities were carried on out of its Chicago office. In the Burley office or branch the activities consisted of the buying, sorting, grading, washing, packaging, storing, and shipping of potatoes in carload lots upon direction and advice from the home office in Chicago. The principal activity which the claimant engaged in consisted of approximately 45 per cent in washing operations and 55 per cent in grading operations at the Burley warehouse. The potatoes handled by the claimant had been purchased from the farmers or growers by agents of the Albert Miller and Company, hereinafter called the company. Usually they were purchased by such agents after they had been placed in the farmer's cellar. They were either purchased and paid for as a lot as they stood in the cellar, or

were purchased and paid for after grading into U. S. No. 1's and U. S. No. 2's, either in the farmer's cellar or in the company's warehouse. The record does not disclose exactly what percentage of the potatoes were sorted and graded in the farmer's cellar and what portion were sorted and graded in the company's warehouse, and it is not unreasonable to assume that approximately one-half of the potatoes handled were [17] purchased and paid for on the basis of measurement or sorting and grading in the farmer's cellar, and the other half paid for on the basis of sorting and grading in the warehouse. Regardless of how they were purchased and paid for, they were all brought into the warehouse for the purpose of further sorting and grading and washing. The first function of the warehouse operation was to feed all of the potatoes through the washer, then to sort them into two grades above noted. The U. S. No. 1's were then packed in 100-pound sacks with the exception of the choice and largest potatoes which were packed in 10-pound and 25-pound sacks. Immediately after such packing in sacks, they were either shipped in carload lots to various United States markets as directed by the home office, or were stored in the basement of the company's warehouse awaiting developments in the potato market. All shipments that were made were in carload lots and were made directly to jobbers in various cities with the exception of some shipments which were consigned from the warehouse to Chicago, and shipping instructions were changed and

they were diverted to other cities and markets in transit. It is significant that practically none of the potatoes shipped out of the Burley warehouse were consigned to retailers.

The claimant, as above stated, entered into such services for the company in November, 1941, and was employed and was paid salary in the following months in the following sums:

Month	Amount of Earnings
November, 1941	\$ 67.75
December, 1941	42.50
January, 1942	87.25
February, 1942	62.00
March, 1942	108.08
April, 1942	114.40
May, 1942	26.95
September, 1942	133.12
October, 1942	264.76
November, 1942	92.22

The referee finds from the foregoing that the claimant's earnings were \$110.25 in the calendar quarter ending December 31, 1941; the sum of \$257.33 in the calendar quarter ending March 31, 1942; the sum of \$141.35 in the calendar quarter ending June 30, 1942; the sum of \$133.12 in the

calendar quarter ending September 30, 1942; and the sum of \$356.98 in the calendar quarter ending December 31, 1942.

Under the provisions of section 209(1)(4), the services rendered by the claimant would not be excepted from "employment" if (1) the Burley warehouse of the company is a "terminal market," or (2) if the work performed at the Burley warehouse was not "an incident to the preparation of such * * * vegetables for market," but was in the order of a process subsequent to the preparation for market. [18]

From the facts disclosed by this record, it is quite apparent that the Burley warehouse of the company was not a terminal market, and the referee so finds. The record discloses that such warehouse was used primarily for the purpose of receiving potatoes from growers, processing them, and shipping them thereafter to other cities, at the end of which latter shipment such potatoes did ultimately reach their terminal market. In these latter cities to which they were shipped they were placed in the hands of jobbers who received them in carload lots from the company and then distributed them to various retailers and dealers, who in turn distributed them to the consuming public. Such being the case, it will now be necessary to consider the question of whether or not the company's operations at the Burley warehouse should or should not be considered as an incident to the preparation of the potatoes for market.

It is customary in the production of potatoes in the district in which the company's warehouse is situated for the farmers to harvest their potatoes and place them in storage cellars. At that point they are not as yet ready for distribution to the consuming public, as potatoes there raised are sold in two grades, to wit: U. S. No. 1's and U. S. No. 2's. The farmer stores them in bulk without sorting or grading them. The potatoes are not sorted or graded until they come into the hands of the company. The company sorts and grades them either in the farmer's cellar or in its own warehouse after trucking the potatoes to its warehouse from the farms at its own expense. The record discloses that upon taking the potatoes from the farmer, and in some cases previous to the actual taking of said potatoes from the farm to the warehouse, the title to the potatoes passes to the company, and through all stages of the company's operations the potatoes handled are the property of the company. After said potatoes are brought into the warehouse either in bulk or in sacks, they are put through a washing process, and then again sorted and graded. All of the U. S. No. 1's are then packaged in either 100-pound sacks or 10- and 25-pound sacks, and some of the No. 2's are packaged in 100-pound sacks and others of the No. 2's are placed in bins in bulk awaiting shipment. At certain seasons of the year some of these potatoes are placed in storage in the warehouse, which warehouse has a capacity of approximately 50,000 sacks in its basement. They remain there for

some indefinite time and are shipped from time to time as orders and directions for such shipment are received from the Chicago office. It is evident from the facts in this case, and the referee finds, that potatoes handled by the company in its Burley warehouse were not fully prepared for market until they were washed and finally sorted and graded, and it is therefore the finding of this referee that the operations of the company in its Burley warehouse were incident to the preparation of potatoes for market.

It is therefore the further finding of this referee that the services performed by the claimant for Albert Miller and Company in its Burley warehouse were excepted from employment as "agricultural labor."

It is the decision of this referee that the wage records kept by the Board shall not be revised to include therein salary received by claimant for services rendered for Albert Miller and Company.

Date: July 8, 1946.

/s/ MARTIN TIEBURG,
Referee. [19]

Case No. 11-126

Federal Security Agency
Social Security Board
Office of Appeals Council

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Primary Insurance Benefits.

AMENDED NOTICE OF HEARING

To: Mr. Archie F. McLean,
114 North Miller,
Burley, Idaho.

The hearing in this case which was scheduled for March 26, 1946, at Commissioner's Room, City Hall, Burley, Idaho, will be held instead on the 26th day of March, 1946, at 11:30 a.m. o'clock in Mayor's Chambers of City Hall Building, Burley, Idaho.

Date: March 20, 1946.

MARTIN TIEBURG,
Referee.

785 Market Street,
San Francisco 3, Calif.

Case No. 11-126

Federal Security Agency
Social Security Board
Office of Appeals Council

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Primary Insurance Benefits.

NOTICE OF HEARING

To: Mr. Archie F. McLean,
114 North Miller,
Burley, Idaho.

In response to a written request in the above case, a hearing will be held by the undersigned, a referee of the Social Security Board, on the 26th day of March, 1946, at 11:30 a.m. o'clock in Commissioner's Room of City Hall Building, Burley, Idaho.

If you cannot be present at that time please
notify me at once.

Copies of papers on file with the Social Security Board which are relevant to the issues, and which may be submitted as evidence at the hearing, will be available for your inspection at the time of the hearing.

You may present at the hearing any evidence on

the issues, either in the form of written documents or the oral testimony of witnesses.

You may call upon the manager of the Field Office located at Twin Falls, Idaho, for information and advice with regard to the hearing.

Remarks:

Issue:

Whether wage earner's services for Albert Miller & Company were excepted from "employment" by section 209(b)(1) of the Social Security Act, as amended.

Date: March 12, 1946.

MARTIN TIEBURG,
Referee,

785 Market Street,
San Francisco 3, Calif.

Federal Security Agency
Social Security Board
Office of Appeals Council

REQUEST FOR HEARING

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Primary Insurance Payments.

To the Social Security Board:

I disagree with the determination made on the above claim, and therefore request a hearing before a referee of the Social Security Board.

Remarks: (If you wish you may use this space for statement of reasons for disagreement.)

I was told the work was covered. I cannot agree with ruling affecting coverage after I worked for one year under coverage in this questioned employment.

Date: 12-18-45.

/s/ ARCHIE F. McLEAN,
Claimant,

114 North Miller,
Burley, Idaho. [22]

(Transcript of the hearing in connection with the claim of Archie F. McLean, Social Security Account No. 518-18-1969, for primary insurance benefits, which was held in Mayor's Chambers, City Hall Burley, Idaho, before Martin Tieburg, Referee, on March 26, 1946. The claimant was present and participated in the hearing.)

Q. Your name is Archie F. McLean?

A. That's right.

Q. Is your correct address 114 North Miller, Burley, Idaho? A. 114?

Q. That's right. A. 114 North Miller.

Q. Mr. McLean, you were employed at one time by the Albert Miller and Company?

A. That's right.

Q. And that employment was in Burley, Idaho?

A. That's right.

Q. What period were you employed by them—in what period—what dates?

A. I started to work sometime along I think about November, 1941.

Q. And when did you end your employment there?

A. Well, we quit—we got through, I think, about the first week in May, 1942.

Q. You worked in May?

A. Well, just 2 or 3 days.

Q. So we have involved here the question of employment in November, 1941, December, 1941, and

then the first 4 months of 1942 and a [23] few days in May, 1942? A. That's correct.

Q. Where did you perform your services?

A. In the warehouse.

Q. And what kind of work were you doing?

A. Well, we were sorting potatoes.

Q. Sorting potatoes?

A. I would like to go back just a little farther if I'm not out of place.

Q. First let's get the answer to that question.

A. Yes, we were sorting potatoes.

Q. Now, these particular potatoes that you worked on, had they been handled by any other concern other than the grower that grew those potatoes previous to the time they came to this warehouse? A. Yes, yes, they had.

Q. And what condition were they in when you worked on them? Were they in the same condition in which the grower had delivered them?

A. These potatoes were bought by Albert Miller from the grower and they sent a crew out and sorted them U. S. No. 1 and No. 2.

Q. Where did they send the crew to?

A. Out to the farmer's cellar.

Q. Were you——

A. No, I didn't have anything to do with that. Albert Miller handles the potatoes different from most of the dealers. The big per cent sends a crew out and sorts them and then they haul them in and put them on the cars. But Albert Miller was a different outfit. They went out here to the country and bought these potatoes U. S. No. 1 and No. 2 in

the farmer's cellar, and paid him for them No. 1 and No. 2. They belonged to Albert Miller. They were out of the hands of the grower entirely. Then Albert Miller brings them into this warehouse where I worked, run them through the washer, sorts them and repacks them, some of them in 100-pound sacks, and the big ones, the 8- and 10-ounces, put those in little bags, most of them 10-pound bags, some 25. They run them through this washer and washed them, and that's the work that I done. They are out of the hands of the grower entirely. They are in the hands of the speculator. Not only that, but in the fall of the year they had a big warehouse that would hold probably 50,000 sacks in the basement, and they went out to the farmers and bought these potatoes and paid for them.

Q. When did they pay for the potatoes?

A. A good many times before they even left the cellar. Sometimes they left them maybe a week or so, and a farmer maybe would come in and wanted his money and they just paid for them. These potatoes in the fall of the year they done the same thing with them they done with these we sorted. They sorted them in the country and brought them in and stored them in the warehouse, and a lot of those potatoes stayed in that warehouse till spring, and we had to sort them again. Those potatoes was ready for the market when they were sorted out here in the country. They were U. S. No. 1 and U. S. No. 2. Most of the 2's we didn't have to do too much to them because they didn't put them in the bags so much. [25]

Q. Do you have any information as to whom Miller sold his potatoes to?

A. Shipped his potatoes all out.

Q. From Burley where would they be shipped?

A. Their head office was in Chicago, you see, and they would get their wires from Chicago to this local here, and maybe they wanted some potatoes in Oklahoma or Texas or some place, and they were billed from here to that destination.

Q. Did they store a great part of the potatoes that went through the firm here in their Burley warehouse?

A. No, they just filled it in the fall of the year, probably 50,000 sacks or something like that, and during the wintertime bought these potatoes from the farmer and they resorted, washed them and resorted and sized them in order to get more money out of the potatoes.

Q. Well, what time of the year is potatoes usually shipped in?

A. What time? Well, early potatoes start about the first of September, and we ship potatoes until way on into May.

Q. And when do they buy those potatoes they store?

A. They are the late potatoes here in October sometime.

Q. And how long do they store those?

A. It just depends a good deal on the season and how they are keeping, or it might depend some on how urgent the demand was for them and

whether they could buy potatoes in the country or not.

Q. Did they always keep a large supply of potatoes stored?

A. In the two seasons—I worked the next fall, too. In the [26] two seasons I worked there they filled the warehouse in the basement. I worked in the fall of 1942.

Q. Where did you get your information that they purchased the potatoes from the growers?

A. Where did I get that information?

Q. Yes.

A. Before I worked in the warehouse I used to sort in the country. I worked down in this Eden country and Hansen. And sometimes in case it wasn't handy for the buyer to go down there and he kind of left it up to us for to buy these potatoes, so that if the farmer come to us and wanted to sell his potatoes he left it up to us to buy these potatoes so we could kind of keep ourselves busy in case he didn't come down there.

Q. Do you know whether or not the price that was paid to the farmer depended upon the amount of salary that the Miller Company had to pay for cleaning and sorting, or was it just a flat price according to what the Miller Company could buy the potatoes for from the farmer?

A. The way they buy potatoes here, they pay so much for these potatoes sorted U. S. No. 1 and No. 2, and the buyer pays for the sorting and the sacks and the transportation.

Q. Who brought the potatoes from the farmer's property to the warehouse?

A. Who hauled them in?

Q. Yes.

A. Well, they usually had some trucks working there for them. [27]

Q. For who?

A. For Miller. But lots of times they had to hire, you know, outside trucks.

Q. Did the farmers ever bring them in themselves?

A. Well, the farmer didn't bring them in—what I mean, it wasn't in the contract for the farmer to bring them in, but some farmers owned trucks, understand, and Albert Miller hired them to bring in potatoes.

Q. What percentage of the potatoes that went through that warehouse were shipped ultimately to Chicago for the Albert Miller Company?

A. Well, I couldn't say. They were diverted all over. Whenever they needed them they were diverted. They might go to Kansas City, to Omaha, to Denver, you understand, and be diverted. They run these potatoes, a lot of them, unsold, but they diverted a lot of them in transit.

Q. Do you have any additional facts or evidence which would indicate that this was employment and was not exempt as agricultural labor which you wish to present at this time?

A. At the time, the first year I went to work for Albert Miller—I worked for an Idaho Falls outfit

down here during the harvest season, and when the harvest season was over they picked out their crews for to go into the country, and I being one of the older men they didn't pick me. And so I came up town along about 10 o'clock one morning and was sitting in the pool hall and this man, the manager of this Albert Miller Company, he came in, and he said to me, "Ain't you working today?" And I said no. He said, "I got a job over here for you if you want it." [28] And I said, "I don't want it if it isn't steady and if it isn't under the coverage of the social security." And he said, "It's steady and it's under coverage." So I said all right. And he said, "Have you got your social security card?" And I said yes. He said, "Go get it." So I went down to the house to get it, but my wife had misplaced it, and when I come back I told him, and he wouldn't let me go to work till I did find it. So the next morning I found it and I went to work. The next year, in the fall of 1942, I went to work the day after Labor Day, and the foreman—the manager wasn't there but the foreman was—and the foreman come along and he said, "Where's your social security card?" And I said, "Well, I didn't bring it. You've got a record of it." And he said, "You bring it in at noon." I said, "They've got my number and my record someplace here." He said, "That don't make any difference; you bring it." So I brought it at noon.

Q. Did they ever make deductions from your

salary at Albert Miller for old-age insurance and for State unemployment insurance?

A. I couldn't say because I didn't pay much attention to it, and lots of times we worked half hours and fifteen minutes and different times, and we didn't know exactly just what we had coming within maybe a dollar or two, and it wasn't made out like it would be out at Kaiser's. It's all itemized there and it shows what they took out—if you earned \$78.00 they took out 78 cents. But this is just a check made out to me—if I had \$50.00 coming it's \$50.00 and it doesn't even show your State liability, and I just took it for granted, probably, they took it out. I wouldn't say because I don't know. [29]

Q. How were you paid—on a time basis?

A. Yes, we were paid by the hour.

Q. And at what rate?

A. Well, at first, the first year I think we got about 50 cents, 55. And the fall of 1942 we got 85 cents an hour.

Q. Do you have a record of all your earnings?

A. I have not, no.

Q. Well, it appears in this case in order to determine whether or not this warehouse constituted a terminal market, or whether the produce had been through a terminal market before your services were performed, it will be necessary to go more in detail into the operations of Albert Miller Company, and, therefore, I am going to send this file back to Chicago where they have their head office and instruct the referee in that office to take a deposition of that firm.

A. To get more of a definite on the earnings?

Q. Not only on the earnings, but on the manner in which they operate. Your information, although it is very enlightening, is not the definite information that is necessary in cases like this. So this will be forwarded to the referee in Chicago, and when he sets the deposition for hearing you will receive a copy of the notice. You are not required to be present, but you can if you want to, but when the distance is so great ordinarily the person doesn't appear. But you are given notice so that if you have anything that you want to bring to the referee's attention; even if you don't appear you can communicate with him by mail and possibly put in his mind some question that you wish to ask. [30]

(Off-the-record discussion.)

Q. We will consider this matter submitted, subject to the deposition being taken, which will be introduced into the record as an exhibit, and at that time the matter will be considered submitted for decision.

We have read the above transcript and certify that it is a true and complete record of the hearing.

Dated: April 9, 1946.

/s/ MARTIN TIEBURG,
Referee.

/s/ LILA B. SHAFER,
Hearing Reporter. [31]

Case No. 11-126

EXHIBITS

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Case 11-126
Exhibit A

41-
Unit 7914

APR 28 1944

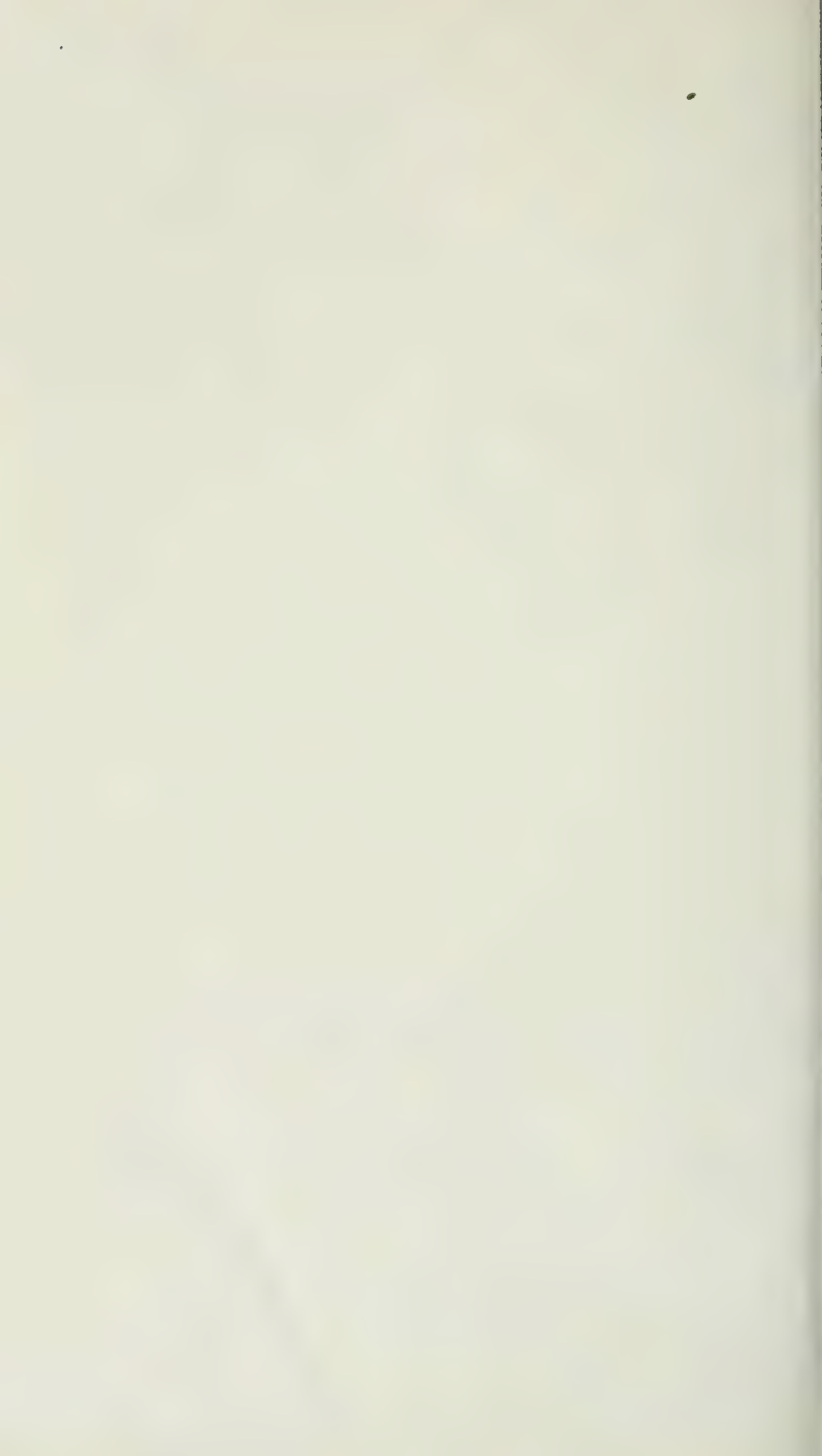
Banner, Wash.
April 17-44
Social Security Board,
Washington, D.C.

If you have a
card of my social Security
number would you please
send them to me, also any
information you may have
on my social security. If you
have no record please
advise me.

TO BE FILED

DATE 5/5/44
Clerk G. H. [illegible]
Unit Room A-1000

Office T. M. [illegible]
Banner, Wash.
Social Security Number 78
8-18-1969 Age 63
Birth date just 24-1880

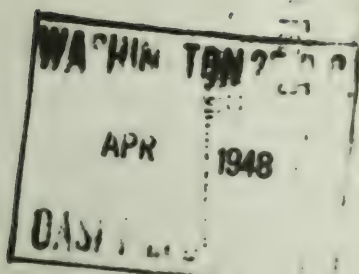


Photo

124 34

Home, Adams.

Charles, T. M. Lewis.
H. - H. - Miller
Burley
Scholar



APR 21 12 17 PM

Y

Case No. 11-126

Exhibit B

Federal Security Agency
Social Security Board
Washington

In Reply Refer to
File No. 14:WR:AE

Mr. Archie T. McLean,
c/o Hudson House,
Dormitory A, Room 302,
Vancouver, Washington.

Dear Mr. McLean:

Re: Account Number 518-18-1969

In your letter of April 17, 1944, you request information concerning your old-age and survivors insurance account. Due to the many articles which have recently been published encouraging workers to check on their old-age and survivors insurance accounts, we have experienced a tremendous increase in the volume of mail received in this office. We regret the delay in replying to your letter, but you may be assured that everything possible is being done to expedite the handling of all inquiries.

There is enclosed a Form OAR-7014 on which has been entered a statement of the wages credited to your account up to the present time. Please read both sides of the form carefully. An itemized statement of your wages is given below:

Employer	Period	Amount
Morrison-Knudsen Co.	7/1/42 - 9/30/42	\$ 484.00
Kaiser Co. Inc.	1/1/43 - 3/31/43	554.80
	4/1/43 - 6/30/43	824.40
	7/1/43 - 9/30/43	826.04
Grand Total.....		\$2,689.24

This wage statement may not include all of your wages for the last two completed quarters because of the time required to receive and record reported wages. [35]

We are enclosing Informational Service Circular 35, entitled, "Old-Age and Survivors Insurance for Workers and Their Families" and Informational Service Circular 1, entitled, "The Social Security Act." If you desire additional information, you may communicate with our field office, Old Post Office Building, Portland 4, Oregon. The representatives there will be glad to assist you.

Sincerely yours,

O. C. POGGE,
Director. [36]

photo

44-14-WR: AET neon 1, Mark
Sept-2-44

National Security Board.

Baltimore
M.B.

P.C. 44
9/20/44
4TH

Your letter of 4TH
was received. There
is a mistake in my
article the number is
& name Archie F. M. Lean
place of my credits
the 91-0277066
82-0146120
so Morrison - Anderson
are correct. but no
credits for Albert Miller
Chicago 5734
Albert Miller Co of Chicago
not to be any more operation
branches 11-126

2

Lerley Idaho. under
 management of
 Len T. ity. In the fall
 1941 I started work
 there in the warehouse
 tining potatoes, this was
 not November worked
 of Dec. and all of Nov 1941
 of Jan. T. it. March.
 April. Sept Oct and
 and some of Dec.
 2. I cannot give you
 amount of my earning.
 average scale. for
 11 - was 50¢ per hour
 Jan T. it. March and
 15¢ per hour. 19-2

CASE NO.

11-126

EXHIBIT

The case

8.—
 made ready for Sept
 22. 7. 11. He was.
 80 per hour.

This company employed
 about 20 men and
 in order that I could
 not I had to have
 social security card
 which I had. I showed
 it to them and they
 took my number.

Since working for them
 they have sold out in
 Burley. Headquarters are
 West, Miller Co. Chicago

The Manager. Mr.
 Fritz is Burley & also

If I can get this
 straightened out at



will be a T. I. he J. two.
 me for with the credits
 that Miller & one
 me and what I
 accumulate by the
 time I reach 65 which
 is Aug 24 - 1945 - I
 will be able to qualify
 & sending you will do
 what you can to get
 this straightened out
 for me. Thanking you
 in advance. I remain

Yours Sincerely
 Archie F. M. Dean
 Vancouver.
 Wash.

Hudson House
 Room - 302
 Room - A

CASE No.

EXHIBIT C

578-18-1969

Turner, Adam
 Burley & others
 114 - H. - Miller

Case No. 11-126

Exhibit D

Vancouver, Wash.

Feb. 24, '45.

Social Security Board,
Baltimore,
Maryland.

Sometime during the year 1944 I wrote you in regards two my credits due me from Albert Miller Co., Burley Idaho, with headquarters in Chicago. I received notice from you that my case had been referred two the Portland Office. I received notice from Portland, filled out a blank form so that they could investigate my case, and later on received notice that the information that they had received from Chicago [41] had been forwarded two Baltimore, and I would receive notice at some future date, so far I have received no word from Baltimore.

I am anxious two get this matter fixed up so if you have any information on my case if you will kindly let me know, I will appreciate it very much and I thank you,

Yours Sincerely,

/s/ ARCHIE F. McLEAN.

Number 518-18-1969.

Vancouver, Wash.,

c/o Hudson House.

Dorm. A, Room 802.

Case No. 11-126

Exhibit E

Federal Security Agency
Social Security Board
Washington

March 6, 1945

Mr. Archie F. McLean,
Dormitory A, Room 302,
c/o Hudson House,
Vancouver, Washington.

Dear Mr. McLean:

Re: Account Number 518-18-1969

In your letter of February 24, 1945, you inquire regarding the progress of the investigation of your Old-Age and Survivors Insurance account.

We are now investigating your case in order to determine whether the services you performed for Albert Miller and Company constitute covered employment as defined by the Social Security Act. As soon as a decision is reached, you will be notified.

Sincerely yours,

O. C. POGGE,
Director.

cc: Coverage Policy Section.

14:WK:CW. [43]

Case No. 11-126

Exhibit F

Vancouver, Wash.

Sept. 30, '45.

Social Security Board,

Baltimore, Md.

Mr. A. C. Pogge.

Dear Sir:

Not hearing from you for so long, I am anxious to find out if you have reached a decision in regards to my credits due me from Albert Miller Co. Chicago.

As I will be leaving Wash. before long, would you be kind enough if you have any information to let me know as soon as possible and I thank you.

Sincerely yours,

/s/ ARCHIE McLEAN.

518-18-1969,

c/o Hudson House.

45

14:CP:G

Account No.
518-18-1969FEDERAL SECURITY AGENCY
SOCIAL SECURITY BOARD

WASHINGTON

2

October 12, 1945

Mr. Archie McLean
c/o Hudson House
Vancouver, Washington

Dear Mr. McLean:

In your recent letter you inquired whether a decision has been reached relative to your employment for Albert Miller and Company, Chicago, Illinois.

We have determined that your employment for Albert Miller and Company is excepted from employment as agricultural labor by section 209(b)(1) of the Social Security Act as amended. That section excepts from employment services performed in the employ of any person in connection with the handling, planting, drying, packing, packaging, processing, or marketing of fruits and vegetables, provided such services are performed upon incident to the preparation of such fruits or vegetables for market. Your services as a sorter come within this definition. Therefore, wages received for this employment cannot be credited to your account.

If you disagree with the determination you may request a reconsideration by the Bureau of Old-Age and Survivors Insurance or that a hearing be held by a referee of the Social Security Board. The request for a hearing should be made promptly and must be filed within six months from this date.

If you have any questions as to what you should do in order to obtain further action or consideration, call at or write to our field office located in the Old Post Office Building, Portland, Oregon.

Sincerely yours,

O. C. Pegge
DirectorField Office, Portland, Oregon
JWW:EDW

CASE NO. 114-26

EXHIBIT G

OCT 12 1945

FILE COPY

BUREAU SYMBOL NO.	DATE	BUREAU SYMBOL NO.	INITIALS	DATE
1420	10/9/45			
114-26	10/10/45			
E. J. B.				

Please place
in W. G. Hall
C. J. B. 11/12/45

Case No. 11-126

Exhibit H

(All items on this form requiring an answer must be answered or marked "Unknown.")

It Is Not Necessary to Employ Anyone to Assist You in Preparing Your Claim. If You Need Assistance Call at or Write to the Nearest Office of the Social Security Board.

APPLICATION FOR WAGE EARNER'S PRIMARY INSURANCE BENEFITS

Notice—Any false statement in this application or misrepresentation relative thereto is a violation of the law and is punishable as such.

I, Archie F. McLean, No. 518-18-1969, hereby make application for the primary insurance benefits payable under the provisions of Title II of the Social Security Act, as amended.

1. I was born: Month—August Day—24 Year—1880.

Place: Smiths Falls, Ontario, Canada.

2. I worked in employment covered by the Social Security Act, as amended, for the following employers during the 1-year period just before the date this application is signed:

Name of Employer: Kaiser Co., Inc.

Address of Employer: Vancouver, Wash.

Work Began: Month — Year —.

Work Ended: Month — Year—. Still employed.

3. State whether you are single, married, widowed, or divorced—married.

4. If married, state your wife's maiden name, age, and date of birth, or your husband's name, age, and date of birth. Name—Margarett Lee. Age—54. Date of birth—1-9-1891.

5. Have you any children, including stepchildren and legally adopted children, under 18 years of age and unmarried? Yes. If so, how many? I.

6. Have you previously filed an application for any benefits under Title II of the Social Security Act? No. If so, state the name under which the application was filed, the approximate date filed, and the place where filed. [46]

Benefits are not payable for any month in which you work for wages of more than \$14.99 a month in employment covered by the Social Security Act.

7. (a) Are you now working for wages of more than \$14.99 a month in employment covered by the Social Security Act? Yes. (If in doubt, consult the nearest office of the Social Security Board.)

(b) Have you worked in the present month, before execution of this application, for wages of more than \$14.99 in employment covered by the Social Security Act? Yes.

8. Do you agree to notify promptly the Social Security Board of any month in which you work for wages of more than \$14.99 in employment covered by the Social Security Act, and to return promptly any check received by you for benefits for such month? Yes.

9. Do you give the Board permission to contact your employer or former employers? Yes.

Remarks:

(This space may be used for explaining any answers to the questions. If more space is required, attach a separate sheet.)

Inactive freeze application.

I solemnly swear (or affirm) that the foregoing statements are true to the best of my knowledge, information, and belief.

Signature of applicant:

/s/ ARCHIE F. McLEAN.

Address: Hudson House,
Vancouver, Wash.

Subscribed and sworn to before me this 22nd day of October, 1945 at Portland, Multnomah, Oregon.

/s/ ETHEL E. RYDELL,
Claims Clerk. [47]

Federal Security Agency
Social Security Board

File: Archie F. McLean

S.S. Account No.: 518-18-1969

TERMINAL QUESTIONNAIRE

All Questions on This Form Should Be Answered
Except Those Crossed Out.

All answers should be full and complete and, if possible, supplemented by any relevant information in the possession of the person executing this form.

1. Give a detailed description of the business activities of the employer. Albert Miller & Co. purchased potatoes from farmers and paid for them in cash; then he held them in his warehouse, and resorted and repacked whatever was necessary, and sold the potatoes to retail dealers.

2. What commodities does it handle?
Potatoes.

3.a. What percentage of the commodities handled are obtained directly from farmers who produce them on their own farms? 90%.

b. What percentage of such commodities are obtained from other sources? 10%.

c. What are the sources? Local dealers.

This was done only when potatoes were scarce and the employer was not able to get sufficient potatoes directly from the farmers.

4. State the radius or territory in miles from which the employer obtains the commodities handled. 40 miles.

5.a. Does the employer buy the commodities which it handles, or does it simply pack and market them for a certain fee? The employer bought the potatoes for cash.

b. If it handles the products for owners for a fee, give a detailed statement of the arrangement between the employer and the owners.

—

6. If some of the commodities are purchased what percentage of the total do they represent?

All. [48]

7. Are these commodities in their raw and natural state when they come to the employer?

Raw and natural state—yes.

8. State the nature and extent of any processing to which such commodities are subjected by the employer. Stored potatoes, resorted and re-packed some, and sold to dealers.

9. Give the average size of the shipments of commodities received by the employer. 2000 to 2500 sacks of potatoes.

10. Give the average size of the shipments of commodities which leave the employer's place of business. 1 carload.

11. Are the commodities shipped out by carload lots? Yes; also truck load.

12.a. State whether the commodities handled by the employer are shipped directly to markets in some other parts of the country.
Yes.

b. If so, give the names of the principal markets to which the commodities are shipped.
Chicago.

c. If not, give the percentage which is disposed of in some other manner, and a description of such manner of disposal.

13.a. Does the employer can any of the commodities which it handles? No.

b. If so, are the canning operations carried on in the building in which the raw products are packed? —

14.a. Did the employee render any services which are related in any way to the canning operations? —

b. If so, explain in detail. — [49]

15.a. Does the employer own or operate a farm?
No.

b. If so, indicate the portion of the employee's time spent on same.

16. Give a detailed description of the services rendered by the employee. Unloaded potatoes off trucks, dumped them in the warehouse, resorted, sized, repacked, potatoes, and reloaded the potatoes.

17. What portion of the employee's time during an average pay period, subsequent to December 31, 1939, was spent in supervising the services of others employed in the preparation of the commodities, such as:

a. handling,	0	f. planting,	0
b. drying,	0	g. packing,	0
c. packaging,	0	h. processing,	0
d. freezing,	0	i. grading,	0
e. storing,	0		

18. What portion of the employee's time during an average pay period, subsequent to December 31, 1939, was spent in the direct performance of services in preparation of the commodities, such as:

a. handling,	45%	f. planting,	
b. drying,		g. packing,	
c. packaging,		h. processing,	
d. freezing,		i. grading	55%
e. storing,			

19. If any of the above services were performed in a supervisory capacity, describe in detail the nature of the supervision. None.

20. What portion of the employee's time in an average pay period, subsequent to December 31, 1939, was devoted to:

a. Office work, None.

b. Supervision of office work of others,
None.

c. Maintenance and repair work during the
"off-season" (indicate period) None.

21. What portion of the employee's time was devoted to other activities? None. (Give a detailed description of such other activities.) [50]

22.a. Does the employer render any services to farmers such as advice on growing or harvesting? No.

b. If so, indicate the percentage of the employee's time spent in such work on the farms, —

This information is submitted for the use of the Social Security Board.

/s/ ARCHIE T. McLEAN,

Employee.

Hudson House,

Vancouver, Wash.

[Stamped]: Received Oct. 22, 1945. [51]

Case No. 11-126

Exhibit J

Federal Security Agency
Social Security Board

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Primary Insurance Benefits.

REQUEST FOR RECONSIDERATION

To the Social Security Board:

I disagree with the determination made on the above claim, and therefore request a reconsideration by the Bureau of Old-Age and Survivors Insurance.

Remarks:

(If you wish you may use this space for statement of reason for disagreement.)

I do not consider my employment for Albert Miller & Co. was agricultural labor inasmuch as my work was for a potato commission company and my duties were sorting and packing potatoes which had been purchased and paid for by the Albert Miller & Co.

[Stamped]: Received Oct. 22, 1945.

Date 10-22-45.

/s/ ARCHIE F. McLEAN,

Claimant,

Hudson House,

Vancouver, Wash. [52]

Case No. 11-126
Exhibit K

14:CP:C
Account No.
518-18-1969

Federal Security Agency
Social Security Board
Washington

November 19, 1945

Mr. Archie F. McLean,
Hudson House,
Vancouver, Washington.

Dear Mr. McLean:

This office has received the questionnaire executed in connection with your request for a reconsideration of our determination holding services performed by you in the handling and packing of potatoes purchased by Albert Miller & Company, Chicago, Illinois, to be "agricultural labor" and, therefore, excepted from "employment" for social security benefit purposes.

An examination of the additional information furnished, together with that previously submitted, fails to disclose any evidence which would permit this office to reverse its previous ruling.

Where fruits and vegetables are concerned, the Social Security Act, as amended, effective January 1, 1940, provides that the term "agricultural labor"

shall include among other things services performed in the handling, packing, packaging, processing and grading of such commodities. This exception to coverage under the Act, as amended, is not limited to services performed on a "farm" in the employ of the producer of the commodities, but also applies to services performed off a farm in the employ of commercial handlers purchasing fruits and vegetables provided the services are rendered as an incident to the preparation of such commodities for market and they have not been delivered to a "terminal market" for distribution for consumption.

It appears from the data submitted by you that Albert Miller & Company, which has its headquarters in Chicago, Illinois, purchased the potatoes from local producers in the area surrounding Burley, Idaho. Your services were performed in the branch warehouse of the concern at Burley. It is considered, therefore, that your services were performed in the handling, processing and grading of potatoes as an incident to the preparation of such commodity for market and prior to its delivery to a terminal market for distribution for consumption. Accordingly, your services for Albert Miller & Company constitute "agricultural labor" and are excepted from "employment" under the Social Security Act, as amended. [53]

In the event you still are not in agreement with this determination, you are entitled to a hearing before a Referee of the Social Security Board and

to appeal to the United States District Court if the decision after hearing should be against you. In case you wish a hearing you should communicate promptly and not later than three months from this date with our Field Office at Old Post Office Building, Portland, Oregon.

Sincerely yours,

O. C. POGGE,
Director.

cc—Portland, Oregon, Field Office

cc—Accounting Operations Division

Contested Wages Unit [54]

09:RO:VIII

450 Midland Bank Building,
Minneapolis 1, Minnesota,
May 13, 1946.

Mr. M. C. Buckholz,
Albert Miller & Company,
308 West Washington Street,
Chicago, Illinois.

Dear Mr. Buckholz:

Re: Case No. 11-126, Archie F. McLean,
Claimant, Wage Earner, Acct. No.
518-18-1969.

I have your letter of May 4, 1946, in regard to the above case, concerning which I informed you we would like to take a deposition on May 22 at 2:30 p.m. in my office at 188 West Randolph Street, Chicago.

The data which you sent about the amounts paid the claimant are appreciated, but this does not obviate the necessity for taking the deposition. The purpose of the deposition is to establish whether the employment is excepted under section 209(b)(1) of the Act, and as coming under the definition of "agricultural labor" given in section 209(1)(4).

I trust you can make arrangements to be present at the time I have indicated. Thanking you for your cooperation, I am,

Very truly yours,

OSCAR M. SULLIVAN,
Referee. [55]

09:RO:VIII

450 Midland Bank Bldg.,
Minneapolis 1, Minn.,
May 3, 1946.

Albert Miller & Co.,
308 West Washington Street,
Chicago, Illinois.
Attention: Mr. M. C. Buckholz.

Dear Mr. Buckholz:

Re: Case No. 11-126, Archie F. McLean,
Claimant, Wage Earner, Acct. No.
518-18-1969.

I have been asked by the referee in Region XII, the Pacific Coast Region, to secure your deposition in connection with the case of Archie F. McLean, who is appealing with respect to certain services rendered by him for Albert Miller & Company in their warehouse at Burley, Idaho, in the period November, 1941, to some time in May, 1942. The main question at issue seems to be whether his services were excepted from "employment" by section 209(b)(1) of the amended Social Security Act.

I am going to be in Chicago on May 22, 1946, and would like to take your deposition at 2:30 p.m., in my office located at Room 2200, 188 West Randolph Street Building, Chicago, Illinois.

Please notify me of your willingness to attend at this time. It might be some time before I will

return to Chicago again, and so I would appreciate it if you would attend so that we can get this matter straightened out.

Very truly yours,

OSCAR M. SULLIVAN,
Referee. [56]

Federal Security Agency
Social Security Board

Office of Appeals Council
Case No. 11-126

In the case of:

Archie F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Primary Insurance Benefits.

NOTICE OF TAKING DEPOSITION

To: Mr. Archie F. McLean,
114 North Miller,
Burley, Idaho.

The deposition of Mr. M. C. Buckholz of Albert Miller & Company, will be taken on the 22nd day of May, 1946, at 2:30 p.m. o'clock, in Room 2200 of the 188 West Randolph Street Building, Chicago, Illinois.

This deposition, when completed, may be introduced in the above case as evidence. You have the right to be present when the deposition is taken, but you are not required to attend.

Date: May 3, 1946.

OSCAR M. SULLIVAN,
450 Midland Bank Bldg.,
Minneapolis 1, Minn. [57]

Case No. 11-126
Exhibit L

Federal Security Agency
Social Security Board
Office of Appeals Council
Case No. 11-126

In the case of:

Albert F. McLean, Claimant and Wage Earner
Social Security Account No. 518-18-1969

Claim for:

Primary Insurance Benefits.

DEPOSITIONS OF MARIE C. BUCKHOLZ
AND LOUISE FRANDEN

The following depositions of Marie C. Buckholz and Louise Franden of Albert Miller & Company, Chicago, Illinois, were taken on the 22nd day of May, 1946, at 2:30 p.m. in the Referee's Office,

Chicago, Illinois, before Oscar M. Sullivan, Referee. Notice of the time and place of taking the deposition was given to all parties in the above case. Archie F. McLean, the claimant, was not present at the taking of the deposition nor was he represented by counsel.

MARIE C. BUCKHOLZ

being first duly sworn, testified as follows:

Examination by Oscar M. Sullivan, Referee:

Q. Give your name and address to the reporter, please.

A. Marie C. Buckholz, 308 West Washington Street, Chicago 6, Illinois.

Q. What is your occupation?

A. I am the assistant secretary of Albert Miller & Company. [58]

Q. As such are you familiar with the operations of the company? A. Yes, I am.

Q. And its employment policies? A. Yes.

Q. How long have you held this position?

A. Twenty-eight years.

Q. And do you have a warehouse or branch at Burley, Idaho?

A. We no longer have that warehouse there, but we did have it up to about two years ago.

Q. Now the questions I will ask relate to the alleged services of one Archie F. McLean, at the warehouse in Burley, Idaho, in 1941 and 1942. How was this warehouse operated during the period in question?

A. Well, the potatoes were purchased and brought to the warehouse for processing and preparing for market.

Q. Were the potatoes purchased from the farmer on the farm?

A. I believe they were purchased on the farm.

Q. You say that you think they were purchased on the farm?

A. They are brought direct from the farm to the warehouse.

Q. Who brought them to the warehouse? Did your trucks or the farmers?

A. Both our trucks and the farmers. Of course, I didn't work right out there at the warehouse, and so I don't know what the procedure there was. It is my understanding that the potatoes were brought to the warehouse and sacked and prepared for sale.

Q. Who brought them to the warehouse? Did the farmers or [59] did your own trucks?

A. I can't answer that.

Q. What was done with them at the warehouse?

A. Well, they are stored, graded, packaged and the usual procedure of preparing them for sale.

Q. Then what was done with them from the Warehouse in Burley?

A. Well, they are put in loaded cars and sold. Of course, we sell them from the Chicago office here and they are shipped out from Burley.

Q. The sale is made here, but they were shipped from the warehouse to whatever point that they were bought?

A. That's right.

Q. And they were not taken to some other market for sale?

A. As far as I know, they were sold to customers all over the country in carload lots.

Q. They were sold in carload lots?

A. Yes, in carload lots.

Q. I want to go over with you some of the testimony of Mr. McLean in his hearing on March 26, 1946, at Burley. On page two of the transcript, he was asked, "Where did you perform your services," and he answered, "In the warehouse." He was asked, "What kind of work were you doing," and he said, "Well, we were sorting potatoes." Then a little farther on he was asked, "Now, these particular potatoes that you worked on, had they been handled by any other concern other than the grower that grew those potatoes previous to the time they came to this warehouse," and he answered, "Yes, yes, they had." Then he was asked, "And what condition were they in when you worked on them? Were they in the same condition [60] in which the grower had delivered them," and he answered, "These potatoes were bought by Albert Miller from the grower and they sent a crew out and sorted them U. S. No. 1 and No. 2." Then he was asked, "Where did they send the crew to," and he answered, "Out to the farmer's cellar." He was asked, "Were you——," and he answered, "No, I didn't have anything to do with that. Albert Miller handles the potatoes different from most of the dealers. The big per cent sends a crew out and sorts them

and then they haul them in and put them on the cars. But Albert Miller was a different outfit. They went out here to the country and bought these potatoes U. S. No. 1 and No. 2 in the farmer's cellar, and paid him for them No. 1 and No. 2. They belonged to Albert Miller. They were out of the hands of the grower entirely. Then Albert Miller brings them into this warehouse where I worked, run them through the washer, sorts them, some of them in 100-pound sacks, and the big ones, the 8- and 10-ounces, put those in little bags, most of them 10-pound bags, some 25. They run them through this washer and washed them, and that's the work that I done. They are out of the hands of the grower entirely. They are in the hands of the speculator. Not only that, but in the fall of the year they had a big warehouse that would hold probably 50,000 sacks in the basement, and they went out to the farmers and bought these potatoes and paid for them." What comment have you on that?

A. I don't know what they did, not having worked out in the warehouse. I wouldn't know anything about that. [61]

Q. Then he was asked, "When did they pay for the potatoes," and he answered, "A good many times before they even left the cellar. Sometimes they left them maybe a week or so, and a farmer maybe would come in and wanted his money and they just paid for them. These potatoes in the fall of the year they done the same thing with them they done with these we sorted. They sorted them in the country and brought them in and sorted

them in the warehouse, and a lot of these potatoes stayed in that warehouse till spring, and we had to sort them again. Those potatoes was ready for the market when they were sorted out here in the country. They were U. S. No. 1 and U. S. No. 2. Most of the 2's we didn't have to do much to them because they didn't put them in the bags so much." Have you any comment on that?

A. When a man buys a carload of potatoes, he specifies whether he wants No. 1's or No. 2's. If the potatoes are in the warehouse any length of time, they certainly would have to be gone over.

Q. He was asked on page four, "From Burley where would they be shipped," and he answered, "Their head office is in Chicago, you see, and they would get their wires from Chicago to this local here, and maybe they wanted some potatoes in Oklahoma or Texas or some place, and they were billed from here to that destination." What comment have you on that?

A. We wire them instructions where to send them. [62]

Q. He was asked, "Did they store a great part of the potatoes that went through the firm here in their Burley warehouse," and he answered, "No, they just filled it in the fall of the year, probably 50,000 sacks or something like that, and during the wintertime bought these potatoes from the farmer, and they resorted, washed them and resorted and sized them in order to get more money out of the potatoes."

A. I couldn't answer that.

The Referee: I will excuse you for a few minutes and call this other lady.

LOUISE FRANDEN

being duly sworn, testified as follows:

Examination by Oscar M. Sullivan, Referee:

Q. Give your name and address to the reporter, please.

A. Louise Franden, 7316 North Lowry, Chicago, Illinois.

Q. Miss Franden, what is your occupation?

A. I am a bookkeeper.

Q. For what concern?

A. Albert Miller and Company.

Q. How long have you been with the company?

A. Seventeen years.

Q. As such are you familiar with or have you had any experience with the plan under which the warehouse at Burley, Idaho, was conducted?

A. Generally speaking, yes. I was out there for nine months.

Q. How long ago was that?

A. Three years ago.

Q. I think I'll take you over some of the points in the [63] transcript. I will start with page two, at the bottom. Mr. McLean has previously testified that Albert Miller had bought the potatoes from the grower and had sent out a crew to sort the potatoes out U. S. No. 1 and No. 2, and on being asked whether he was with the crew he answered, "No,

I didn't have anything to do with that. Albert Miller handles the potatoes different from most of the dealers. The big per cent sends a crew out and sorts them and they haul them in and put them on the cars. But Albert Miller was a different outfit. They went out here to the country and bought these potatoes U. S. No. 1 and No. 2 in the farmer's cellar and paid him for them No. 1 and No. 2. They belonged to Albert Miller. They were out of the hands of the grower entirely. Then Albert Miller brings them in to this warehouse where I worked, run them through the washer, sorts them and re-packs them, some of them in 100-pound sacks, and the big ones, the 8 and 10 ounces, put those in little bags, most of them 10-pound bags, some 25. They run them through this washer and washed them, and that's the work that I done. They are out of the hands of the grower entirely." What do you say to that?

A. I don't know how other merchant potato buyers handle their potatoes, but we did hire crews to go out and sort potatoes in the cellar. They were sorted out there, and were loaded into cars when they came in. However, when we'd buy bulk potatoes, maybe we'd buy a cellar. We'd measure the cellar and say that we'd give them so much and they were brought into the [64] warehouse and sorted there.

Q. Now, let me see. You say that when they were sorted on the farm, they were brought in and put right in the cars? A. That's right.

Q. What was the warehouse used for?

A. The warehouse was used for storage and sorting.

Q. And what potatoes did you bring in there?

A. It depended upon the time of year and the market. If the market was low, then they bring them in and store them in bulk bins. They weren't sacked or sorted when they were bought from the farmer.

Q. These potatoes all belonged to the Miller Company when they were brought into the warehouse and the Miller Company then hired people to sort them, is that right?

A. That's right.

Q. Does this description of what he did sound right?

A. If he was hired right there at the warehouse to sort and package, he probably was the man who dumped them from the bag into the washer.

Q. And so the Miller Company had already paid the farmer for the potatoes, the farmer wasn't paid after you sorted them?

A. No, he was paid after they were sorted. In most instances he was paid after they were sorted according to the grade, U. S. No. 1 or No. 2.

Q. Then sometimes the farmer was paid in advance and sometimes he was paid afterwards, after they were sorted?

A. Yes.

Q. You wouldn't know what policy was followed in——

A. It [65] depended upon how the farmer wanted to sell them. If he wanted to sell them in

the cellar so much for the whole cellar, we'd pay him for this amount, but if he wanted them sorted and graded by us, we would pay him afterwards.

Q. I believe that's the nub of the whole thing, to what extent the man worked on potatoes that had already been bought by the Miller Company and to what extent his sorting was done in order to affect the price the farmer got afterwards.

A. I can see that, but that varied. We would buy them to sort and pay the farmer what we got out of sorting them.

Q. In some cases you paid after you had sorted them, the price depending upon how they sized up in the sorting and before you sold to any other party?

A. Oh, yes.

Q. On page three he was asked, "When did they pay for the potatoes," and he answered, "A good many times before they even left the cellar. Sometimes they left them maybe a week or so, and a farmer maybe would come in and wanted his money and they just paid for them. These potatoes in the fall of the year they done the same thing with them they done with these we sorted. They sorted them in the country and brought them in and stored them in the warehouse, and a lot of those potatoes stayed in that warehouse till spring, and we had to sort them again. These potatoes was ready for the market when they were sorted out here in the [66] country. They were U. S. No. 1 and U. S. No. 2. Most of the 2's we didn't have to do too much to them because they didn't put

them in the bags so much." What comment have you on that?

A. I didn't sack the potatoes or have much to do with that end of it, but to my knowledge they were sorted, well, as I said before, according to how the farmer wanted to sell them.

Q. Have you any basis for estimating what proportion of the potatoes were bought from the farmer on the farm before they were sorted with no understanding as to whether they were one grade or another, or what proportion of them were brought into the warehouse and the farmer was paid after they had been sorted U. S. No. 1 or No. 2, the price he was to receive depending upon this sorting or grading.

A. I am quite sure that most of them were paid after they were sorted in the warehouse, according to the grading made.

Q. On page four the referee asked, "Did they store a great part of the potatoes that went through the firm here in their Burley warehouse," and he answered, "No, they just filled it in the fall of the year, probably 50,000 sacks or something like that, and during the wintertime bought these potatoes from the farmer and they resorted, washed them and resorted and sized them in order to get more money out of the potatoes."

A. The customary way that they were handled was that the buyer would go out to the farm [67] and contract to buy potatoes at such and such a price, so much for No. 1's and No. 2's, and then

they would pay them for the No. 1's and No. 2's that they got out of the potatoes. That's my recollection of it.

Q. He was asked, "And when do they buy those potatoes they store," and he answered, "It just depends a good deal on the season and how they are keeping, or it might depend some on how urgent the demand was for them and whether they could buy potatoes in the country or not." Then he was asked, "Did they always keep a large supply of potatoes stored," and he answered, "In the two seasons—I worked the next fall, too. In the two seasons I worked there they filled the warehouse in the basement. I worked in the fall of 1942."

A. That's probably true because they did store a lot of potatoes in the warehouse.

Q. He was asked, "Where did you get your information that they purchased the potatoes from the grower," and he answered, "Before I worked in the warehouse I used to sort in the country. I worked down in this Eden country and Hansen. And sometimes in case it wasn't handy for the buyer to go down there and he kind of left it up to us for to buy these potatoes, so that if the farmer come to us and wanted to sell his potatoes he left it up to us to buy these potatoes so we could kind of keep ourselves busy in case he didn't come down there." Do you know anything about that?

A. No, I don't know anything about that. [68]

Q. Then he was asked, "Do you know whether or not the price that was paid to the farmer de-

pended upon the amount of salary that the Miller Company had to pay for cleaning and sorting, or was it just a flat price according to what the Miller Company could buy the potatoes for from the farmer," and he answered, "The way they buy potatoes here, they pay so much for these potatoes sorted U. S. No. 1 and No. 2, and the buyer pays for the sorting and the sacks and the transportation."

A. I think that's right. They pay the men who work an hourly wage, so much an hour. The Miller Company paid for the sorting.

Q. The Miller Company paid for the sorting, but did the farmer's price depend on how they were graded? A. Yes.

Q. He was asked, "Who brought the potatoes from the farmer's property to the warehouse?" and he answered, "Who hauled them in?" The referee said, "Yes," and he answered, "Well, they usually had some trucks working there for them." Then continuing on he said, "But lots of times they had to hire, you know, outside trucks."

A. We had a regular truck or two to use when the farmer didn't bring them in.

Q. "Did the farmers ever bring them in themselves," that's the next question, and he answered, "Well, the farmer didn't bring them in—what I mean, it wasn't in the contract for the farmer to bring them in, but some farmers owned trucks, understand, and [69] Albert Miller hired them to bring in potatoes." What comment have you on that?

A. I can't remember whether they paid the farmer so much when he hauled them in himself or not. I can't remember for sure. It seems to me they do in some instances, but I couldn't say positively.

Q. Now, he gives this account of how he happened to be hired. "At the time, the first year I went to work for Albert Miller—I worked for an Idaho Falls outfit down here during the harvest season, and when the harvest season was over they picked out their crews for to go into the country, and I being one of the older men they didn't pick me. And so I came up town along about 10 o'clock one morning and was sitting in the pool hall and this man, the manager of this Albert Miller Company, he came in, and he said to me 'I got a job over here for you if you want it.' And I said, 'I don't want it if it isn't steady and if it isn't under the coverage of the social security.' And he said, 'It's steady and it's under coverage.' So I said all right. And he said, 'Have you got your social security card,' and I said yes. He said, 'Go get it.' So I went down to the house to get it, but my wife had misplaced it, and when I come back I told him, and he wouldn't let me go to work till I did find it. So the next morning I found it and I went to work. The next year, in the fall of 1942, I went to work the day after Labor Day, and the foreman—the manager wasn't there but the foreman was—and the foreman come along and he said, 'Where's your social security card,' and I said,

‘Well, I didn’t [70] bring it. You’ve got a record of it.’ And he said, ‘You bring it in at noon.’ I said, ‘They’ve got my number and my record some place here.’ He said, ‘That don’t make any different; you bring it.’ So I brought it at noon.”

A. We did insist on having their social security number for purposes of income tax cross identification, so as to get their right name, number, etc.

Q. Is there anything further you would like to say, Mrs. Franden?

A. I don’t know of anything that I could say to help this thing along. I’m afraid to talk.

Q. There are two questions that need to be answered in this case. One is whether the services performed by Mr. McLean were performed incident to delivery to market, and the second one is whether this warehouse was a terminal market for distribution for consumption.

A. The terminal market is in Chicago. They are preparing for market in the warehouse.

Q. I understood that the testimony was that they were often shipped direct from the warehouse to the different customers all over the United States.

A. They were sold to jobbers elsewhere. You see, our sales were never direct to the consumer. You see we are carload potato distributors, and they were sold from there in carload lots to different dealers. Rather, they were sold from Chicago, but delivery was made from there.

The Referee: I think that will be all right now. Mrs. Buckholz, will take the stand again. [71]

MARIE C. BUCKHOLZ

having been previously sworn, testified as follows:
Examination by Oscar M. Sullivan, Referee:

Q. In the light of Miss Franden's testimony is there anything you would like to say?

A. Well, about those social security cards, it was essential that we have their correct account number. It was an instruction by the American Fruit and Vegetable Shipping that every employee was to show a social security number and so we were very insistent upon getting them.

Q. I am showing you a letter which bears your signature. This was sent to me and is on the letter head of the Albert Miller Company. Is that your signature? A. Yes.

Q. I will put this in evidence as Deposition Exhibit 1. Will you examine it and state whether this is a statement of what was paid to Archie McLean in those respective months for his services?

A. Yes, that's taken off of our payroll record.

Q. When any of these potatoes were sold from Burley—or rather shipped from the warehouse at Burley to different dealers all over the country, the sale was made here in Chicago, is that right?

A. Yes, the sale was made here, and we wired instructions to ship the potatoes to various places.

Q. And as far as you know, the testimony of Miss Franden [72] is correct, that the sorting was paid for by the company with the farmers customarily not paid until the potatoes had been graded and were paid according to that grading?

A. I think that's probably right.

The Referee: I think that's all. Is there anything else that you can think of?

LOUISE FRANDEN

having been previously sworn, testified as follows:
Examination by Oscar M. Sullivan, Referee:

Q. Miss Franden, you were at the Burley warehouse for nine months, were you not? A. Yes.

Q. Now, it is an important point to ascertain whether the farmer was customarily paid for the potatoes just as they were on the farm or whether he was in the great majority of cases paid on the basis of the sorting that was done in this warehouse. Can you clear that up?

A. I would say that it was the practice in most cases to pay after they were graded, because we have a sort of contract book and the buyer would go out to the farm and see the potatoes and tell the man that he would give him so much for his potatoes and that our price was so much for No. 1's and No. 2's. In most cases that was the way it was handled.

Q. And what about the hauling. Did the farmer do the hauling or the company?

A. That would depend upon the farmer. If he offered to haul them in and I think the majority of them [73] did offer. We had a few trucks that were used in case they didn't offer to bring them in.

Q. When the farmer hauled them in, was he given an extra allowance for doing this?

A. I don't remember in all cases, but I know

that in some cases they were. I can remember a few instances.

Q. Can you make an estimate as to the proportion of potatoes that were simply bought as is from the farmer and the proportion that were bought subject to grading?

A. I would say that it was a very small percentage that were bought as is because there is such a wide variation in the value of No. 1's and No. 2's. They naturally want to get the higher price. They were almost always paid on the basis of the grading.

Q. And the information you have given is based on your recollections while you were a bookkeeper at the warehouse in Burley?

A. Yes, and that has been over three years ago.

Q. Was it customary to give the employees of the company, these persons who did the sorting, to give them a statement as to what the deductions were, if any, on social security?

A. Yes, if we deducted, it was on the statement.

Q. Do you remember whether the employees who did the sorting and packaging had any deductions made?

A. No, they had no deductions for old-age benefits.

Q. Was the custom the same in the years previous to the time you went out there?

A. Yes, they were. [74]

Q. Was there a different bookkeeper there prior to the time you came there?

A. I can't remember who it was, but I think we

did have a man out there. Oh, yes, I believe it was Oscar Scherer.

Q. Do you know if he is still around there?

A. No, he is working for a packing house in Denver I believe.

Q. But you are pretty sure the system has always been the same. In other words, the payment to the farmer was based on the sorting of the potatoes, how they stood after they were sorted?

A. Yes, that's right.

The Referee: I think that will be all, Miss Franden. I thank both of you for coming.

(Whereupon, the deposition was closed at 3:30 p.m.)

We have read the foregoing and hereby certify that it is true and complete transcript of the questions and answers constituting the examination.

/s/ OSCAR M. SULLIVAN,
Referee.

/s/ EUGENE F. MILLER,
Reporter.

Case No. 11-126

Exhibit D-1

Albert Miller & Co.
Carlot Potato Distributors
Chicago, Illinois

May 4, 1946

Mr. Oscar M. Sullivan,
450 Midland Bank Building,
Minneapolis, 1, Minnesota.

Re: Case No. 11-126, Archie F. McLean,
Claimant, Wage Earner, Acct. No.
518-18-1969.

Dear Sir:

In reference to your letter of May 3rd, beg to advise that the writer has personally checked the records of Archie F. McLean and that he was employed as follows:

November, 1941	earnings	\$ 67.75
December, 1941	"	42.50
	Total for 1941	<hr/> \$110.25
January, 1942	earnings	\$ 87.25
February, 1942	"	62.00
March, 1942	"	108.08
April, 1942	"	114.40

May,	1942	"	26.95
September,	1942	"	133.12
October,	1942	"	264.76
November,	1942	"	92.22
			<hr/> \$888.78

Our interpretation of his employment were governed by amended Social Security Act, section 209(b)(4). We therefore made no deductions for Federal Old Age Benefits.

If there is any further information you should require do not hesitate to get in touch with us.

Yours truly,

ALBERT MILLER & CO.

By /s/ M. C. BUCKHOLZ.

[Stamped]: Received May 6, 1946. [76]

Case No. 11-126
Exhibit M

Burley, Idaho
June 9, '49.

Mr. Martin Tieburg.

Dear Sir:

Your letter of June 6 received and contents noted, in regards to my earnings, that is o.k.

In regards to the testimony given in regards to the way they bought and paid for the potatoes, it is not the way they were handled, only in very rare cases where the grade could not be made in the country due to dirty potatoes which had to be washed at the warehouse. In that case [77] their was very few handled that way.

As I stated at the hearing in Burley, the big bulk of the potatoes handled in Burley by Albert Miller Co., were sorted U. S. No. 1 and No. 2 in the farmers sellers, and were paid for on that basis. The No. 1 were hauled to the warehouse, resorted, washed, sized and a good many put in small sacks.

The evidence given at the hearing in Chicago, is not the true facts, and they know it.

If you need further proof that I am right, I can get plenty of proof that the way I stated is [79] the way the bulk of the potatoes were bought and paid for.

Sincerely yours,

/s/ ARCHIE McLEAN.

[Stamped]: Received June 13, 1946. [79]

[Endorsed]: No. 12523. United States Court of Appeals for the Ninth Circuit. Oscar Ewing, Federal Security Administrator, Appellant, vs. Archie F. McLean, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed June 19, 1950.

PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12523

**OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,
APPELLANT**

v.

ARCHIE F. McLEAN, APPELLEE

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN
DIVISION**

BRIEF FOR APPELLANT AND APPENDICES

H. G. MORISON,
Assistant Attorney General.

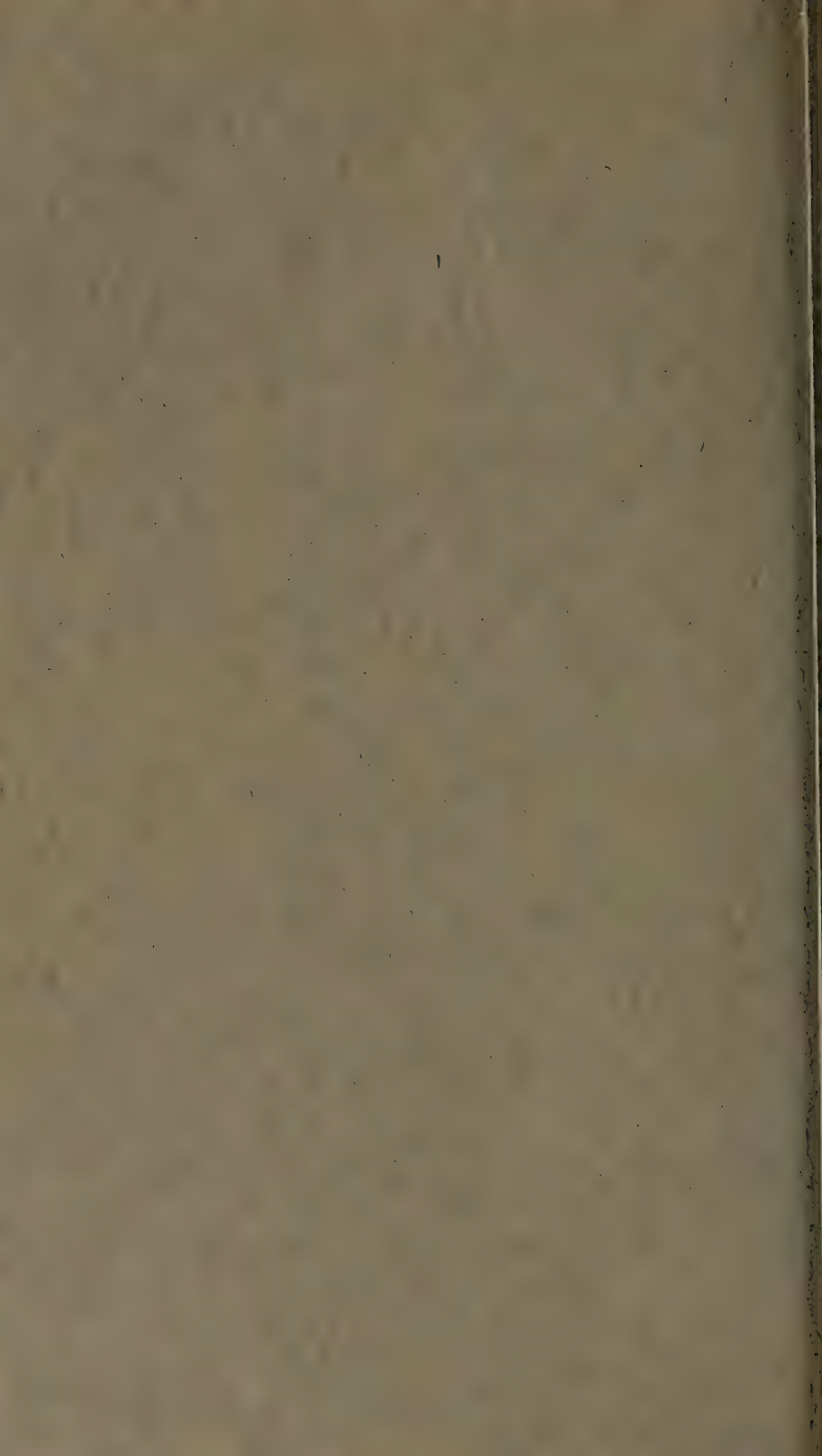
JOHN A. CARVER,
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Of Counsel:

EDWARD H. HICKEY,
IRVIN M. GOTTLIEB,
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LEONARD B. ZEISLER,
Attorney, Federal Security Agency.



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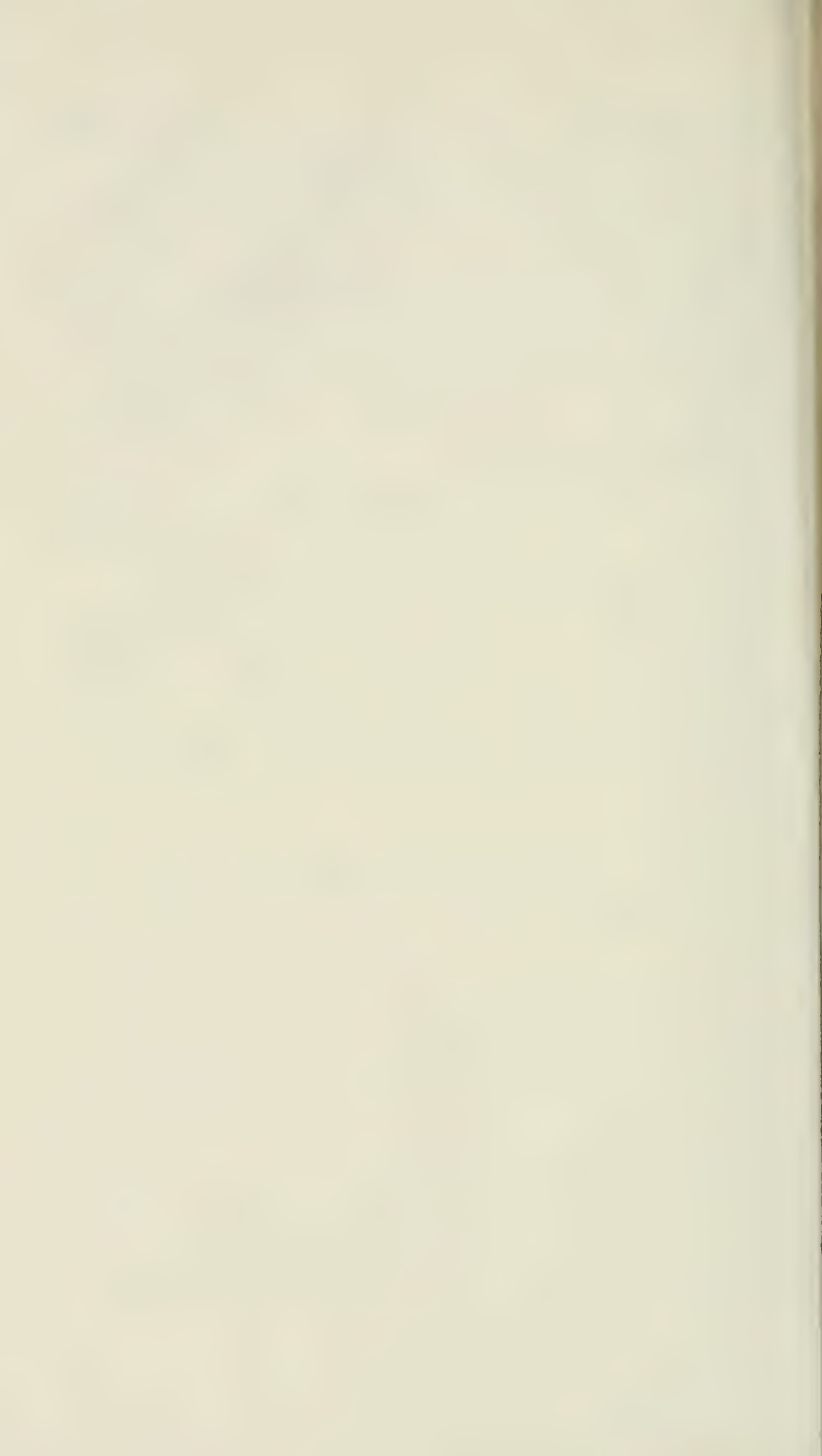
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In the United States Court of Appeals for the Ninth Circuit

No. 12523

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,
APPELLANT

v.

ARCHIE F. McLEAN, APPELLEE

*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN
DIVISION*

BRIEF FOR APPELLANT AND APPENDICES

JURISDICTIONAL STATEMENT

This action was instituted in the U. S. District Court for the District of Idaho, Southern Division, against Oscar Ewing, Federal Security Administrator, pursuant to Section 205 (g) of the Social Security Act as amended (42 U. S. C. 405 (g), 53 Stat. 1360, 1370), to review the Administrator's final decision denying the plaintiff's request for revision of his wage record so as to include therein compensation alleged to have been received by him for services rendered Albert Miller and Company in 1941 and 1942. The defendant filed a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

The jurisdiction of this court to review the judg-

ment of the district court is sustained by Section 205 (g) of the Social Security Act as amended and by 28 U. S. C. 1291.

STATEMENT OF THE CASE

This is an appeal from an order and final judgment of the U. S. District Court of the District of Idaho, Southern Division, reversing the decision of the Federal Security Administrator¹ and remanding the case to him with directions to revise the wage records maintained by the Social Security Administration with respect to the plaintiff's wages, so as to include in said wage records payments of compensation made to the plaintiff by Albert Miller and Company during the last quarter of 1941 and during 1942, and providing that upon such remand the Federal Security Administrator should take further proceedings not inconsistent with that judgment.²

¹ The administration of Title II of the Social Security Act was originally vested in the Social Security Board. By the President's Reorganization Plan No. 2, effective July 16, 1946 (Section 4, House Document 595, 79th Congress, 2d Sess., 11 F. R. 7873, 60 Stat. 1095, set out in note under Section 133y-16 of Title 5, U. S. C.) it was abolished and its functions transferred to the Federal Security Administrator. The Social Security Administration is the operating branch of the Federal Security Agency which administers Title II of the Social Security Act. The Bureau of Old-Age and Survivors Insurance and the Office of the Appeals Council are constituent units of the Social Security Administration.

² The District Court's decision in this case as a judicial precedent that services such as those of McLean come within the rule of the *Burger* case, *infra*, p. 4, (and hence constitute covered employment under the Act) affects approximately 25,000 wage earners engaged in the processing of fresh fruits and vegetables in the employ of commercial handlers. It affects the question of the coverage of such wage earners both with respect to Title II benefit provisions of the Social Security Act and the related taxing provisions admin-

The decision reversed by this judgment found that the services performed by the plaintiff for Albert Miller and Company in 1941 and 1942 were "agricultural labor," as defined in Section 209 (1) (4) of the Social Security Act as amended [42 U. S. C. 409 (1) (4), 53 Stat. 1360, 1377] and therefore were excepted from "employment" as defined in Section 209 (b) of that Act, and that consequently compensation paid him for such services were not "wages" to be included in his wage record as defined in Section 209 (a) of said Act.

SPECIFICATION OF ERRORS RELIED UPON

The district court erred:

1. In failing to hold that the services performed by the wage earner, Archie F. McLean, for Albert Miller & Company, a Chicago corporation, at its Burley, Idaho, warehouse were properly considered by the Federal Security Administrator to be "agricultural labor" as defined in Section 209 (1) (4) of the Social Security Act, as amended (42 U. S. C. 409 (1) (4) and in the corresponding tax statute, Chapter 9A of the Internal Revenue Code, 26 U. S. C. 1426 (h) (4) so that the payments he received therefor during the last calendar quarter of 1941 and during 1942 were properly excluded from wage credits.

2. In failing to hold that plaintiff's services were performed prior to the delivery of the potatoes to a istered by the Bureau of Internal Revenue. If upon reconsideration of its decision in the *Burger* case, *infra*, p. 4, this court should determine to overrule it, the number of wage earners affected will of course be much greater. The case therefore involves an issue deserving of serious consideration.

terminal market and as an incident to the preparation of such potatoes for market.

3. In holding that the Burley, Idaho, warehouse of Albert Miller & Co. was a terminal market for distribution for consumption.

4. In holding that the plaintiff's services were performed after the potatoes had reached the (a) grower's market or (b) the terminal market.

5. In failing to hold that the washing, sorting, and grading operations performed by plaintiff at the Burley, Idaho, warehouse were performed as an incident to the preparation of such potatoes for market within the meaning of Section 209 (1) (4) of the Social Security Act, as amended, 53 Stat. 1377, and within the meaning of the Social Security Administration Regulations No. 3, Part 403, Title 20 CFR, Sec. 403.808 (e).

6. In concluding that the decision of the Ninth Circuit Court of Appeals in *Miller v. Burger*, 161 F. (2d) 992, dealing with the workers of a commercial handler purchasing fruit outright, is controlling here, where the washing, sorting, and grading of the potatoes was incident to their preparation for market and was necessarily performed by plaintiff as the statutory agent of the farmer grower prior to completion of which operations title to the potatoes remained in the farmer grower.

7. In substituting its own views of "agricultural labor" for the statutory definition adopted by Congress for Title II of the Social Security Act and corresponding tax provisions.

8. In disregarding the Federal Security Administrator's findings and finding independently and without support in the record that when the Burley, Idaho, warehouse of Albert Miller & Co. received the unwashed, unsorted, and ungraded potatoes that they were then in a merchantable state and that the farmer growers had parted with all economic interest and title therein.

9. In not holding that the Social Security Act makes no distinction between the farmer growers of fresh vegetables and the commercial handlers thereof, insofar as the latter performs for such farmer-grower services incident to the preparation of such vegetables for market (a) thereby nullifying the exception of services such as washing, sorting, and grading, incident to the preparation of vegetables for market, without regard to the Congressional purpose as established by the legislative history of the 1939 amendments to the Social Security Act and to the respect due the expertness of the Federal Security Administrator, and (b) invalidating the Regulations promulgated by the Social Security Administration.

10. In holding that Albert Miller & Co. was not the statutory agent of the farmer grower for the performance of the washing, sorting, and grading operations.

11. In denying defendant's motion for summary judgment and in reversing and remanding the cause.

STATUTES AND REGULATIONS INVOLVED

For the convenience of the court, the statutes and regulations herein involved are assembled in Appendix B attached hereto (pp. 75-80, *infra*).

Prior to 1940, Title II of the Social Security Act excepted "agricultural labor" from employment without defining it. Section 210 (b) (1) of the Act of August 14, 1935, 49 Stat. 625. Effective January 1, 1940 (42 U. S. C. 409 (b)), agricultural labor was given a statutory definition in Section 209 (1) of the Act as amended (42 U. S. C. 409 (1), 53 Stat. 1377) which provides in pertinent part as follows, for the period beginning January 1, 1940:

(1) The term "agricultural labor" includes all service performed—

(4) *In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market.* The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. [Italics supplied.]

Social Security Administration Regulations No. 3, Part 403, Title 20, CFR, Section 403.808 (e) provides as follows:

(e) Services described in Section 209 (1) (4) of the Act:

(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, processing, freezing, grading, storing, or delivering to storage or to market, of any agricultural or horticultural commodity, other than fruits, and vegetables (see subparagraph (2) below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

Generally services are performed "as an incident to ordinary farming operations" within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organiza-

tion or group are not performed "as an incident to ordinary farming operations."

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in subparagraphs (1) and (2) above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for consumption.

The Social Security Board Regulation No. 2, July 20, 1937, governing the period up to December 31, 1939, Title 20, CFR, Section 402.6 provided as follows:

Agricultural labor. The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising,

feeding, or management of live stock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute agricultural labor, however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges and orchards.

Forestry and lumbering are not included within this exception.

Treasury Regulation 91, Article 6, 26 CFR, Chapt. I, Section 401.6, governing the period up to December 31, 1939, provided as follows:

Agricultural labor. The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising, feeding, or management of live stock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which

were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute agricultural labor, however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges, and orchards.

Forestry and lumbering are not included within the exception granted by section 811 (b) of the Act.

QUESTIONS PRESENTED

1. Was the appellee, Archie F. McLean, engaged in "agricultural labor" as defined in Section 209 (b) (1) of the Social Security Act, as amended [42 U. S. C. § 409 (b), 53 Stat. 1360, 1377] during the last quarter of 1941 and during 1942, and hence excepted from "employment" as defined in Section 209 (b) of that Act [42 U. S. C. 409 (b)]?

2. Is the question of coverage of the appellee herein under Section 209 (b) (1) of the Social Security Act, as amended [42 U. S. C. § 409 (b), 53 Stat. 1360, 1377], controlled by *Miller v. Burger*, 161 F. (2d) 992 (C. A. 9)?

3. Was the Burley, Idaho, potato warehouse and processing plant of Albert Miller & Company a "terminal market" within the intent and meaning of the 1939 amendments to the Social Security Act, 42 U. S. C. § 409 (1) (4), 53 Stat. 1377, 1378?

4. Had the farmer-growers of the potatoes herein parted with all of their economic interest in the potatoes upon the taking possession thereof by Albert Miller & Company through their Burley, Idaho, agents, prior to the washing, sorting, and grading of said potatoes?

5. What is the geographic scope of the test to be applied to determine the point at which the ordinary grower of potatoes customarily parts with his economic interest in his product?

THE ADMINISTRATIVE PROCEEDINGS

The plaintiff filed with the Bureau of Old-Age and Survivors Insurance of the Social Security Administration a request to have his wage record, as kept by the Bureau, revised to include therein wages alleged to have been paid him by Albert Miller and Company (Supp. Tr. 127-130). The Bureau denied the request (Supp. Tr. 134). Upon his request a hearing was held before a referee of the Social Security Administration on March 26, 1946 (Supp. Tr. 112-120). On July 8, 1946, the referee affirmed the decision of the Bureau (Supp. Tr. 99-107). On March 25, 1948, the plaintiff requested the Appeals Council of the Social Security Administration to review that decision (Supp. Tr. 97). On July 2, 1948, the Appeals Council affirmed the decision (Supp. Tr. 75-79).

In conformity with the practice of the Federal Security Administrator that decision became his final decision.

THE PROCEEDINGS IN THE DISTRICT COURT

This action was begun on August 31, 1948, to review the decision of the Federal Security Administrator (Tr. 2-8). In due time the defendant filed his answer to the complaint, including the complete transcript of the administrative record (Tr. 15-21). In view of the limited nature of the judicial review in proceedings authorized by Section 205 (g) of the Social Security Act and of the fact that the record before the court consists only of the pleadings, including the transcript of the administrative record, the Administrator moved for summary judgment under Rule 56 (b) of the Federal Rules of Civil Procedure (Tr. 23). The District Court rendered judgment reversing the decision of the Administrator and remanding the case to him with directions as aforesaid (Tr. 53). It wrote no opinion.

THE FACTS

The plaintiff performed services for Albert Miller and Company in November and December 1941, and in every month of 1942 with the exception of June, July, August, and December (Supp. Tr. 169-170). Albert Miller and Company, a corporation, had its principal office in Chicago, Illinois, and was designated as a "car-lot potato distributor" (Supp. Tr. 169). The plaintiff was employed in a warehouse owned by it in Burley, Idaho. The activities carried on by the company at said warehouse consisted of

washing, sorting, grading, packaging, storing, and shipping in carload lots, potatoes which it bought of potato growers in the vicinity. Approximately 45 percent of the activities in which the plaintiff engaged consisted of washing operations and 55 percent of grading operations. The growers store the potatoes, when harvested, in their cellars. Potatoes are sold as U. S. No. 1's and U. S. No. 2's. The company would buy a cellar full of potatoes, either before or after they had been sorted and graded (Supp. Tr. 102-103). The referee said,

The record does not disclose exactly what percentage of the potatoes were sorted and graded in the farmer's cellar and what portion were sorted and graded in the company's warehouse, and it is not unreasonable to assume that approximately one half of the potatoes handled were purchased and paid for on the basis of measurement or sorting and grading in the farmer's cellar, and the other half paid for on the basis of sorting and grading in the warehouse. Regardless of how they were purchased and paid for, they were all brought into the warehouse for the purpose of further sorting and grading and washing. The first function of the warehouse operation was to feed all of the potatoes through the washer, then to sort them into two grades above noted. The U. S. No. 1's were then packed in 100-pound sacks, with the exception of the choice and largest potatoes which were packed in 10-pound and 25-pound sacks. Immediately after such packing in sacks, they were either shipped in carload lots to various U. S. markets as directed

by the home office, or were stored in the basement of the company's warehouse awaiting developments in the potato market. * * *

It is customary in the production of potatoes in the district in which the company's warehouse is situated for the farmers to harvest their potatoes and place them in storage cellars. At that point they are not as yet ready for distribution to the consuming public, as potatoes there raised are sold in two grades; to wit, U. S. No. 1's and U. S. No. 2's. The farmer stores them in bulk without sorting or grading them. The potatoes are not sorted or graded until they come into the hands of the company. The company sorts and grades them either in the farmer's cellar or in its own warehouse after trucking the potatoes to its warehouse from the farms at its own expense. * * *

At certain seasons of the year some of these potatoes are placed in storage in the warehouse, which warehouse has a capacity of approximately 50,000 sacks in its basement. They remain there for some indefinite time and are shipped from time to time as orders and directions for such shipments are received from the Chicago office. It is evident from the facts in this case, and the referee finds, that potatoes handled by the company in its Burley warehouse were not fully prepared for market until they were washed and finally sorted and graded, and it is therefore the finding of this referee that the operations of the company in its Burley warehouse were incident to the preparation of potatoes for market (Supp. Tr. 103, 106-107).

These findings were adopted by the Appeals Council (Supp. Tr. 76), but instead of the referee's finding

that all shipments, with the exception of some shipments which were consigned from the warehouse to Chicago, were made in carload lots to jobbers in various cities, who distributed them to retailers and dealers, the Appeals Council made the following finding:

The evidence received by the Appeals Council subsequent to the referee's decision indicates that approximately 60 percent of the potatoes which were purchased locally by the management of the company's warehouse in Burley, Idaho, were shipped to various points in the United States upon directions received from the company's Chicago office and that approximately 40 percent of such potatoes were sold by the manager of the Burley warehouse, under general authority given him by the company, to local produce companies, local, intrastate, and interstate transportation companies, restaurants, stores, and private individuals; that most of the potatoes which were sold locally from the warehouse had been purchased directly from the growers, having been sorted and graded in the growers' cellars and were not washed and sorted in the warehouse (Supp. Tr. 76-77).

On the question whether the company paid for the potatoes before or after they were graded neither the referee nor the Appeals Council made a finding, but we believe that there is abundant evidence in the record to prove that there was a wide variation in the price of U. S. No. 1 and U. S. No 2 potatoes and that in most instances they were not paid for

until after they were sorted. If the farmer wanted to sell them in the cellar ungraded, the company would pay him so much for the whole cellar, but that happened only in a very small percentage of cases [See testimony of Louise Franden, Supp. Tr. pp. 73-75, 157-163, 166-168; testimony of Marie C. Buckholz, Tr. p. 72].

THE CONTENTIONS OF THE PARTIES

The issue in this case is whether, under the circumstances above set forth, the services performed by the plaintiff for Albert Miller and Company at its warehouse in Burley, Idaho, were services performed in the handling and grading of potatoes as an incident to their preparation for market and before their delivery to a terminal market for distribution for consumption within the meaning of Section 209 (1) (4) of the Social Security Act, as amended and Social Security Administration Regulations No. 3, Part 403, Title 20 CFR, Section 403.808 (c) and Section 1426 (h) (4) of the Internal Revenue Code, 53 Stat. 1387, which are identical and provide that all services performed—

In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this

paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.³

are excepted from "employment" as defined in those Acts. If they are so excepted, the remuneration paid the plaintiff for such services was not "wages" as defined in the Act and the plaintiff is not entitled to have such remuneration included in the wage record maintained for him by the Social Security Administration on the basis of which his entitlement to benefits under the Social Security Act and the amount of such benefits is determined.

The court below held on the authority of the decision of this court in *Miller v. Burger*, 161 F. (2d) 992 (C. A. 9), that his services were not excepted from "employment" by the section above quoted.

Appellee will no doubt argue that that decision should be affirmed. Appellant contends it should be

³ H. R. 6000, the Social Security Act Amendments of 1950, which will probably have been enacted before this cause is argued, defines "agricultural labor" in entirely different terms, but since the new definition does not become effective until January 1, 1951, and is not retroactive, it will not affect the issues in this case. The Federal Security Agency will have to decide for many years to come whenever a wage earner who performed services in connection with the handling of fruits or vegetables between January 1, 1940, and December 31, 1950, applies for benefits under the Act whether he was engaged in "agricultural labor." The same question will have to be decided by the Bureau of Internal Revenue if employers who have paid Social Security taxes file claims for refund.

reversed because (1) the decision in *Miller v. Burger* was not well considered and should therefore be overruled; (2) the facts of this case distinguish it from *Miller v. Burger*; (3) if the facts found by the Appeals Council in the instant case are insufficient to distinguish it from *Miller v. Burger*, then the cause should be remanded to the Administrator with directions to take additional testimony and make additional findings of fact on the issues which the court now holds to be material to the decision of this case.

**THE LEGISLATIVE HISTORY OF SECTIONS 209 (1) (4) OF THE
SOCIAL SECURITY ACT AND 1426 (h) OF THE INTERNAL
REVENUE CODE**

Under Title II of the Social Security Act of 1935, 49 Stat. 622-625, any individual who had attained 65 years of age and to whom wages [defined as "all remuneration for employment"] had been paid after December 31, 1936, and before he attained age 65, of not less than \$2,000 was entitled to receive an old-age benefit from the date on which he attained age 65 until his death [Sections 202 and 210]. Title VIII, Section 801, 49 Stat. 636, imposed upon the income of every individual a tax equal to a certain percentage of the wages received by him with respect to "employment," and Section 804, 49 Stat. 637, imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the same percentage of the wages paid by him with respect to "employment."

Both Titles defined employment as "any service, of whatever nature, performed within the United States by an employee for an employer except [1]

‘agricultural labor’ ” [Sections 210 (b), 49 Stat. 625, and 811 (b), 49 Stat. 639]. Neither Title defined the term “agricultural labor.” But under Article 6 of the Social Security Board Regulations No. 2, Title 20 CFR 402.6 and Article 6 of Treasury Regulations 91, 26 CFR, Chapter I, §401.6, that term was narrowly defined. No services were included in the term “agricultural labor” unless either (a) performed on a farm in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising, feeding, or management of livestock, bees, or poultry, or (b) if not performed on a farm, unless the services consisted of processing, packing, packaging, transporting, or marketing of farm products, and then only if performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and only if such processing, etc., was performed as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

Similar regulations were adopted by many State agencies administering State unemployment compensation acts. Under these regulations, whether Federal and State taxes should be imposed upon identical operations depended upon the identity of the employer for whom they were performed rather than upon the nature of the work done. A grower was not required to pay Social Security taxes on the labor employed in packing his own fruit, although a growers’ cooperative and a commercial packer were. *Batt v. United States*, 151 F. (2d) 949 (C. A. 9); *Latimer v. United States*, 52 F. Supp. 228, 235 (D. C., S. D. Cal.);

Fosgate v. United States, 125 F. (2d) 775 (C. A. 5); *Lake Region Packing Association v. United States*, 146 F. (2d) 157 (C. A. 5); *Florida Ind. Comm. v. Growers Equipment Co.*, 152 Fla. 595, 12 So. (2d) 889. A commercial handler of shade tobacco in Connecticut was required to pay employment taxes on its labor (*H. Duns & Co. v. Tone*, 125 Conn. 300, 5 Atl. (2d) 23), although the same work performed for a grower off the farm was exempt from taxation. *American Sumatra Tobacco Corp. v. Tone*, 127 Conn. 132, 15 Atl. (2d) 80. A fruit grower in Washington handling his own fruit paid no taxes (*In Re Wenatchee Beebe Orchard Co.*, 16 Wash. (2d) 259, 133 P. (2d) 283), whereas a cooperative association of growers and a commercial handler whose help performed the same services were liable. *Cowiche Growers v. Bates*, 10 Wash. (2d) 585, 117 P. (2d) 624; *In Re Yakima Fruit Growers Association*, 20 Wash. (2d) 202, 146 P. (2d) 800.

The legislative history of the Social Security Act clearly indicates that the purpose of the change in the definition "agricultural labor" made by the Social Security Act Amendments of 1939 (53 Stat. 1360, et seq.) was to remove the inequities claimed to result from the operation of the "agricultural labor" exception in the original act.

At the hearings before the House Ways and Means Committee relative to the Social Security Act Amendments of 1939, it was strongly argued by representatives of the fruit and vegetable growers that the operations of washing, grading, storing, processing, packing, packaging, and delivering to storage or to market

or to a carrier for transportation to market of fruits and vegetables were an integral part of farming operations; that these operations were performed as an incident to the preparation of such fruit and vegetables for market; many of them were required by law to be performed before the fruits and vegetables could be marketed.

It was contended that the small farmers could not afford to build and equip the plant necessary to perform the various services necessary to prepare fruits and vegetables for market, such as washing, grading, and processing. Therefore they were often obliged to form cooperatives to perform such processing services for them, or to have the processing done for them by a commercial processor.

It was thought that if farmers' cooperatives and commercial handlers were subject to the tax imposed by the Social Security Act, measured by the wages which they paid for such services, while the large producers who could afford to build and equip their own packing plants and operate them by their own employees were exempted therefrom, the small growers would be unfairly discriminated against because the handlers, both cooperative and commercial, would shift the tax back to them by reducing, by the amount of the tax, the amount payable to the grower for his product.

As was said in the brief filed by the International Apple Association:

We have shown that the whole process from the bud to the final washing, brushing, grading,

and packing at the point of production is all part of one process before the grower can obtain value for his product * * *. To say that agricultural labor stops with the picking of fruit and leaving it in crates, boxes, or piles on the farm, unwashed, unsorted, or ungraded and not packed, unless the grower does those things himself on the actual farm, is to ignore facts, realities, and the essential steps that fruit growers have had to take in the evolution of production.

We understand that the point has been made that the charge for washing, brushing, grading, and packing in a central packing house would not be borne by the producer. It absolutely is and would be borne by the producer and no one else. And if this tax has to be paid on the labor in a packing house, the grower will pay that. Not only that, but if the grower sells without performing these acts, then whoever stands in the grower's shoes discounts the price sufficiently to take care of these charges. (Hearings Relative to the Social Security Act Amendments of 1939 Before the Committee on Ways and Means, House of Representatives, 76th Cong., 1st Sess., Vol. 2, p. 1699).⁴

The "agricultural labor" exception was amended for the express purpose of removing such tax inequalities. As amended, the definition of "agricultural labor" is contained in Section 209 (l) *supra* of the Social Security Act and Section 1426 (h) of the Internal Revenue Code. Those sections define "agricultural

⁴ Other testimony introduced at these hearings bearing on this question is printed in Appendix A, attached hereto.

labor" so as to include therein (1) the services enumerated in Article 6, Paragraph (a) of Social Security Regulations No. 2 (and the corresponding provisions of the Treasury Regulations), if performed *in the employ of any person*; (2) certain other services performed in the employ of the owner, tenant, or other operator of a farm in connection with its operation, management, etc., *if the major part of the services are performed on a farm*; (3) services performed in connection with the production or harvesting of certain other commodities *whether or not performed on a farm or in the employ of the owner or tenant of a farm*; (4) the services enumerated in the paragraph to be construed in the instant case, which provides as follows:

In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

The Committee reports contain the following explanation of the provisions of Section 209 (1). (H.

Rep. No. 728, 76th Cong., 1st Sess., pp. 50, 52-53; S. Rep. No. 734, 76th Cong., 1st Sess., pp. 61, 63-64):

The present law exempts "agricultural labor" without defining the term. It has been difficult to delimit the application of the term with the certainty required for administration and for general understanding by employers and employees affected.

Your committee believes that greater exactness should be given to the exception and that it should be broadened to include as "agricultural labor" certain services not at present exempt, as such services are an integral part of farming activities. In the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones.

* * * * *

Paragraph (4) of the subsection extends the exemption to service (though not performed in the employ of the owner or tenant or other operator of a farm) performed in the handling, planting, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity, provided such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of the paragraph, however, do not ex-

tend to services performed in connection with commercial canning or commercial freezing, nor to services performed in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. The expression "as an incident to ordinary farming operations" is, in general, intended to cover all services of the character described in the paragraph which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group, as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group. The expression also includes the delivery of such commodity to the place where, in the ordinary and natural course of the particular kind of farming operations involved, the commodity accumulates in storage for distribution into the usual channels of commerce and consumption. To the extent that such farmers, organizations, or groups engage in the handling, etc., of commodities other than those of their own production or that of their members, such handling, etc., is not regarded as being carried on "as an incident to ordinary farming operations." In such a case the rules set forth in subsection (c) of this section apply.

In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute "agricultural labor" even though not performed as an incident to ordinary farming

operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting, grading, or storing of citrus ["citrus" appears in House Report 728, at p. 53 but not in Senate Report 734 at p. 64] fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities. [Italics supplied.]

In the course of the debate on the bill in the House, Congressman Buck, a member of the Ways and Means Committee, and the sponsor of this amendment, explained Section 209 (1) as follows:

These paragraphs are based on the theory that what is agricultural labor is determined by *the nature of the work and not by whom the man is employed*. Agricultural labor starts with the planting of a crop. It ends when that crop has been delivered to market or to a carrier for transportation to market, and all the intervening steps should be regarded as in the nature of agricultural labor.

* * * *

* * * I stated a few minutes ago that I am a farmer. I have a fairly large acreage, and on it I have a packing plant where I can clean, wash, and pack my own fruit.

That labor is exempt. If 10 or 20 of my neighbors do the same thing in the same way, if they get together and build a cooperative

packing shed on the railroad and wash their apples or their pears, and pack their fruit and use the same type of labor under the same circumstances, they are now taxed under the rulings of the Bureau of Internal Revenue, because the work is done off of a farm. Where is the justice in that, in making the small producer suffer?

* * * *

Let me add that the Pure Food and Drugs Act of the United States and many State laws require rigid inspection of agricultural commodities, and in the case of apples and pears require that they be washed before they can be shipped in interstate commerce. The average farmer is in no position to handle this work by himself on his farm. He must cooperate with his neighbors in a common packing plant where his fruit can be washed, his beans graded and cleaned, and so on. All these processes are a part of the preparation of the farm crop for market, and it has been unfair and inequitable for the Bureau of Internal Revenue to make rulings which tend to restrict all of these operations to a given farm. Their rulings have worked to the advantage of those who have large acreages *on which they can carry through a complete agricultural operation from producing a crop to delivering for transportation to market.* It might be very fairly said the present amendment is intended not merely to state clearly what Congress considers are agricultural operations but to remove the inequities that now exist.

* * * *

* * * in the opinion of those of us who helped to draw this amendment these various services *which form an integral part of agriculture* were intended to be covered by Congress in its original enactment; * * *.

* * * * *

Let me call attention to another serious anomaly. If you are the owner of a farm, and you enter into a written agreement with a marketing agent to pick and pack your crop, whether it is fruit or beans or anything else, the labor employed by the marketing agent is considered to be agricultural labor at the present time; but if you sell your fruit or beans to that same marketing agent and he comes in with a crew and packs your crop, that is not agricultural labor under the rulings of the Bureau of Internal Revenue. Services performed by the employees of a company handling tobacco in warehouses off the farm but in the immediate neighborhood where the process of fermentation was carried on, however, have been held to be agricultural, so that the Treasury has applied no uniform rule in connection with its idea of limiting agricultural labor to work on the farm. In the case of cotton ginning, packing lettuce, and so forth, however, a very rigid restriction has been made limiting the exemption to work done on a farm itself.

* * * * *

These curious distinctions produce inequities among people operating in the same commodities in the same localities, and certainly this is an injustice. 84 Cong. Rec. 6864-6865, June 8, 1939. [Italics supplied.]

It is thus clear that under the paragraph to be construed in this case all services performed in the handling, planting, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of fruits and vegetables are "agricultural labor" even though they are not performed on a farm or in the employ of a farmer or as an incident to ordinary farming operations, if performed as an incident to the preparation of such fruits or vegetables for market and before delivery to a terminal market for distribution for consumption. By way of contrast, it should be noted that while with respect to agricultural commodities other than fruits and vegetables such services do not constitute "agricultural labor" unless performed by an employee of a farmer, farmers' organization, or group services performed as an incident to the preparation of fruits or vegetables for market are "agricultural labor" though performed by commercial handlers, since such services need not be performed as an incident to ordinary farming operations.

It is clear also that in the expression "as an incident to the preparation of such fruits or vegetables for market" preparation for market was intended by Congress to mean preparation of fruits and vegetables in their raw or natural state for sale to consumers who buy them for domestic or industrial uses and that the expression includes all services necessary to put fruits and vegetables into that condition no matter by whom the services are performed. The term "terminal market" was intended to designate the

place of business to which such products are shipped, prepared for sale to consumers, and from which they enter into the usual channels of distribution for consumption. Until they are delivered to such a place of business in that prepared condition, all of the enumerated services performed in handling fruits and vegetables are "agricultural labor."

ARGUMENT

Miller v. Burger Should Be Overruled

In the instant case Albert Miller and Company, a commercial processor, was engaged in washing, sorting, grading, and packaging potatoes which it bought of the growers in its vicinity.

As shown above, the committee reports on Section 209 (1) (4) expressly declare that the services performed in the sorting, grading, or storing of fruits or in the cleaning of beans as an incident to the preparation for market are "agricultural labor," even though performed in the employ of a commercial handler of such commodities.

We can perceive no distinction between the washing, sorting, and grading of potatoes and the sorting, grading, or storing of fruits or the cleaning of beans. We believe, therefore, by this analogy that the court below should have held that the services performed by appellee were "agricultural labor." But it held on the authority of *Miller v. Burger*, 161 F. (2d) 992 (C. A. 9), that they were not "agricultural labor." We believe that the decision in the *Burger* case was not well considered and that this court should now re-

consider and overrule it and reverse the decision of the District Court in the instant case.

The court below overruled the decision of the Appeals Council in the instant case on the authority of this court's decision in *Miller v. Burger*, 161 F. (2d) 992 (C. A. 9), which affirmed the decision of the District Court for the Southern District of California, Northern District, reported under the name of *Burger, et ux. v. Social Security Board*, 66 F. Supp. 619 (S. D. Cal.).

In the *Burger et ux.* case, *supra*, the District Court had held that the operations of grading, cleaning, washing, sulphuring, fumigating, and packaging dried fruit, when performed by a commercial packer for his own account after he had bought the fruit from the growers, were not services rendered as an incident to the preparation of such fruit for market. It recognized that, under the identity of the employer test applied under the Social Security Act of 1935 by the Social Security Board and the Bureau of Internal Revenue, those growers with sufficient production to support their own processing or packing plants could market their products tax-free, while identical products of the smaller grower, processed and distributed collectively through grower-owner cooperatives or independently through commercial packers, were compelled to compete for market carrying the burden of the tax. It recognized also that the present definition of "agricultural labor" in Section 209 (1) of the Social Security Act and Section 1426 (h) of the Internal Revenue Code, as amended in 1939, was adopted to eliminate the tax discrimination resulting from the definition of "agricultural labor" in the

regulations promulgated under the Social Security Act of 1935 and that the above sections were amended for the purpose of broadening the definition of "agricultural labor" contained in those regulations.

But it held that the exemption from employment taxes of agricultural commodities, whether produced by a large grower, by a member of a cooperative, or by a small nonmember continued only

"* * * up to the point where the commodity in the ordinary course of trade normally passes out of the hands of the producer or grower, and from that point forth must bear alike the burden of such taxes. When this purpose is given full effect, it seems equally clear that the 'market' Congress meant is the 'growers' market'—the place or point where and the time when the ordinary producer or grower of the commodity customarily parts with economic interest in its future form or destiny.

* * * * *

"All properly cognizable indicia point to a construction of the legislative definition which will operate to exempt as 'agricultural labor' *all service performed for the account of the producer or grower in connection with* (1) the production or raising and harvesting of any agricultural or horticultural commodity and (2) *preparation of the commodity for and delivery to a producers' or growers' market in the form or condition in which such commodity is customarily sold or disposed of by the ordinary producer or grower thereof*, regardless of whether such exempted service be performed by an employee of the producer or grower, or by

an employee of a cooperative of which the producer or grower is a member, or by an employee of a commercial handler rendering such service for the account of the producer or grower. [*Italics supplied.*]

* * * *

“* * * The services of employees like Burger are performed not for the account of any grower, but for the sole account of a commercial handler engaged in the middleman business of placing the dried fruit in channels of ‘distribution for consumption’.”

This court, in affirming that decision, said (p. 993) that since it was in substantial accord with the legal conclusions reached by the District Court, it would serve no useful purpose to enter upon an extensive discussion of the law of the case, and indicated its agreement with the District Court’s construction of the statute. It is respectfully submitted that that decision should be reconsidered.

The court’s fundamental error was due to its assumption that under the statute there was a point along the producer-to-consumer route of a given commodity prior to delivery to a terminal market at which processing services ceased to be “agricultural labor” and that Congress had not designated “which, or more accurately, whose market was meant by that word” (66 F. Supp. 626).

We do not believe that Congress intended to designate any such point. The word “market” in the expression “preparation of such fruits or vegetables for market” was used synonymously with “sale”; that it is descriptive of a condition of the fruits and

vegetables and not of the place at which such commodities are sold or of the individuals to whom they are sold. "Preparation * * * for market" means "preparation for sale," without reference to the place where the sale is to be made. It comprises the various operations which the commodity, by law or custom, is required to undergo before it can be offered for sale.

That such use of the expression "preparation for market" is a common one is clear. Webster's International Dictionary, second edition, 1941, defines the word "process" as "to subject to some special process or treatment * * * to subject [esp. raw material] to a process of manufacture, development, preparation for the market, etc., to convert into marketable form." This definition is quoted in *Kennedy v. State Board of Assessment and Review*, 224 Iowa 405, 276 N. W. 205, 206 (Iowa); *France Company v. Evatt*, 143 Ohio State 455, 55 N. E. (2d) 652, 653; *Huron Fish Company v. Glander*, 146 Ohio State 631, 67 N. E. (2d) 546; *Morris v. Burrows*, 180 S. W. 1108, 1113 (Texas Civil Appeals); *Colbert Mill and Feed Company v. Oklahoma Tax Commission*, 188 Okla. 366, 109 P. (2d) 504; where the court, after quoting the above definition, said (p. 506):

The quoted definition of the word "process" shows that it is synonymous with the expression "preparation for market" which in turn has the same meaning as the expression "preparing for sale" used in the statute under consideration.

In *Claim of Lazarus*, 268 A. D. 547, 52 N. Y. S. (2d) 682, affirmed sub nom. *In re Lazarus*, 294 N. Y. 613, 64 N. E. (2d) 169, a case involving the construction of the expression "preparation for market" in a section of the New York Unemployment Insurance Law identical with Section 209 (1) (4) of the Social Security Act, the court said:

The phrase "preparation for market" means the act of transforming the product from its raw and natural state into the prescribed, packaged form so that it may be saleable to the wholesaler, retailer, and consumer.

Only if "preparation for market" is construed as being synonymous with "preparation for sale" can effect be given to all the language of the statute without reading into it words which cannot, by fair intendment, be found there, and only so can it be administered without making the subtle, not to say whimsical, distinctions which Congress wished to avoid.

On its face Section 209 (1) (4) makes no distinction between the services of drying, packaging, processing, etc. of fruits and vegetables performed on or off a farm, in the employ of or for the account of a grower or of an individual other than a grower.

The language as well as the legislative history of Section 209 (1) (4) shows clearly that Congress intended to provide that all services performed in handling fruits and vegetables which are necessary to put them into the condition in which they can be sold to consumers are "agricultural labor" even though not performed on a farm, or in the employ of a farmer

and even though not performed as an incident to ordinary farming operations.

As will be shown hereafter, the last sentence of Section 209 (1) (4) means merely that after an agricultural commodity has been prepared for sale to consumers, and has been delivered to a market where it is offered for sale to consumers, no further services performed in handling, drying, packing, packaging, processing, freezing, grading, or storing shall be excepted from employment as "agricultural labor."

It is to be noted that throughout its opinion the District Court in *Burger et ux. v. Social Security Board et al.*, 66 F. Supp. 619, ignores the distinction made by the statute and the Committee Reports between fruits and vegetables and all other agricultural commodities. Not only in those parts of the opinion quoted above (pp. 32, 33, *supra*), but throughout, the court speaks only of "commodities" as if the statute made no distinction between services performed as an incident to ordinary farming operations and services performed as an incident to the preparation of fruits and vegetables for market. If Congress did not intend to differentiate between them, it is difficult to account for the difference in the language used in regard to them.

Evidently its failure to note the distinction led the court to misconstrue the expression "preparation for market." It is true that in the case of agricultural products other than fruits and vegetables the services must be performed as an incident to ordinary farming operations. It could, therefore, be argued that in this respect the statute was intended to continue in effect the regulations promulgated under the Social

Security Act of 1935 and that the services must be performed by or for the account of the grower.

But it is clear from the language of the statute itself as well as from the Committee Reports that, since services performed in the handling etc., of fruits and vegetables need not be performed "as an incident to ordinary farming operations," the statute does not distinguish between such services performed by or for the account of a grower and similar services performed by or for the account of a middleman.

Any possible obscurity in the language of the statute is clarified by the House and Senate Committee Reports, *supra*. These state that the services are "agricultural labor"

even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph for example, services performed in the sorting, grading or storing of fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

Congress accepted the thesis, at least as to fruits and vegetables, that "the whole process from the bud to the final washing, brushing, grading, and packaging at the point of production is all part of one process before the grower can obtain value for his product" and that until that process is completed and the fruits and vegetables have been delivered to

market or to a carrier for transportation to market prepared for sale to consumers, all services performed in handling them are "agricultural labor." All such services are referred to by Congressman Buck "as an integral part of agriculture intended to be excepted from 'employment'" (*supra*, pp. 26 and 28).

Congress intended that thenceforth the test of "agricultural labor" should be, not the identity of the individual for whom or for whose account the services were performed, but the nature of the services. The court's construction makes the identity of the individual *for whose account* the services are performed the test instead of the identity of the individual *in whose employ* the services are performed; i. e., the farmer in whose behalf the processing was performed.

To read into the statute a provision that services performed by cooperatives or commercial handlers in the handling of fruits and vegetables as an incident to their preparation for market are "agricultural labor" only when performed for the account of the grower defeats, in part at least, the purpose of the amendment to remove the tax inequities which have "resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones." [See Committee Reports quoted at p. 24, *supra*.]

For, while taxes are never imposed with respect to services performed in the handling of fruits and vegetables produced by large operators, services performed in the handling of fruits and vegetables produced by small farmers would be taxed if performed by middlemen for their own account, after the grow-

ers had parted with their economic interest in the fruits and vegetables. As will be pointed out more fully below, this necessitates the drawing of subtle distinctions based on facts difficult to ascertain. Such distinctions have been characterized by Congressman Buck as "curious distinctions" which "produce inequities among people operating in the same commodities in the same localities" [*supra*, p. 28].

As pointed out at the hearings, if such services are taxed, the taxes will be borne by the grower whether or not the services are performed for his account. The price which the processor pays for fruits and vegetables is determined roughly by the price fixed in the central wholesale markets in large cities less the cost of transportation thereto and the processing costs he incurs. If to those costs is added the amount of the excise tax, with respect to having individuals in his employ, exacted under the Internal Revenue Code, the price he pays the grower will be diminished by the same amount. At least Congress so believed. The statement in the committee reports [*supra*, p. 24] that "in the case of many of such services it has been found that the incidence of the taxes falls exclusively upon the farmer" constitutes a legislative finding to that effect, which must be respected by this court since it obviously has a reasonable basis.

The committee reports state that greater exactness should be given to the "agricultural labor" exception than is given by the regulations issued under the Social Security Act of 1935. Congress obviously intended to adopt a test of what is "agricultural labor" which would be more exact and easier to apply than that

provided for in the regulations. As construed by the court, Sections 209 (1) (4) of the Social Security Act and 1426 (h) (4) of the Internal Revenue Code can hardly be said to meet these specifications.

The distinction drawn by the court between agricultural and nonagricultural labor is not based solely on whether the services are performed for the account of the grower or for the account of a commercial handler or other middleman, but on whether or not the services performed for the account of the grower are services performed in connection with the "preparation of the commodity for and delivery to a producer's or grower's market in the form or condition in which such commodity is customarily sold or disposed of by the ordinary producer or grower thereof." The growers' market is defined as the "place or point where and the time when the ordinary producer or grower of the commodity customarily parts with economic interest in its future form or destiny."

Whether the court means that the growers' market is the place or point where the grower parts with legal title to his product though he retains an equitable title or other interest therein is not clear. Assuming, the the court did in *Baiocchi v. Ewing*, 87 F. Supp. 520 (N. D. Cal.),⁵ decided by the United

⁵ In that case the court held the services performed by a non-profit agricultural cooperative in grading, processing, and picking dried fruit produced by its members after it had acquired legal title thereto were nonagricultural labor although under its by-laws it was not permitted to retain any profits and each member had an equal proprietary right in its property and assets. It was not disputed that the cooperative performed such services for its

States District Court for the Northern District of California, Southern Division, on December 8, 1949, that it means the point at which he parts with his legal title, it is by no means clear how that point can be determined by the agencies administering the Social Security Act and the Internal Revenue Code.

Section 18 of the Uniform Sales Act, which has been adopted in 37 states including Idaho and California, provides that "where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case." Section 19 lays down some rules for ascertaining the intention of the parties which, however, are applicable only where a different intention does not appear. What is the intention of the parties to a contract of sale, when it is not expressed, is always a difficult question to decide, even for a court which has the parties before it. Facts must frequently be found from conflicting evidence, and, even if the facts are undisputed, opinions will often differ as to the inferences to be drawn from them. Administrative agencies such

members exclusively and that the entire net proceeds of the fruit which it processed and sold were distributed to its members and the conclusion seemed inescapable that the tax would be borne by its grower members. The contention that the cooperative acted merely as agent or trustee for the members who retained an equitable title to the fruit until sold by the cooperative was passed over.

as the Bureau of Old-Age and Survivors Insurance and the Bureau of Internal Revenue would obviously encounter great difficulties in obtaining the evidence necessary to decide such questions with neither of the parties to the contract before them, and the expense to the agencies as well as to the parties to the contract, of obtaining the evidence on which their decisions must be based might prove to be burdensome.

Moreover such a test would be impracticable because the distinction between agricultural and non-agricultural labor would be made to depend on the form of the contract between grower and processor rather than on the substance of the transaction; on whether, under the contract the purchase price to be paid by the processor was stated to be the price of unprocessed fruit or the market price of processed fruit less the cost of processing, although in either case the price realized by the grower would be the same, and whether or not passage of title was delayed until after the processive services had been completed. In any case payment of the tax could easily be evaded merely by providing in the contract that title to the commodity should not pass until after the services had been performed. Congressman Buck's explanation of this section in the House shows that the incidence of the tax was not intended to depend on the form of the contract.

But the administrative agency's difficulties do not end when it has been determined that in a particular case the services were performed before or after the

grower had parted with title to the commodity. The preparation of fruits and vegetables for market frequently consists of several operations, some performed by the grower, some by the processor; but all of them must be performed before they can be sold to the consumer and, viewed realistically, constitute separate steps in the process of preparation for market. Under the statute as construed by the court whether any of these operations is "agricultural labor" depends on whether it is *customarily* performed by or for the account of the ordinary grower.

For instance, in *Burger, et ux, v. Social Security Board et al.*, 66 F. Supp. 619, 621, it appeared that the grower sliced the fruits, removed the pits, placed the halves on drying trays which were set in the sun, sulphured the peaches, apricots, and nectarines, packed them into sweat boxes or sacks, and delivered them to Rosenberg Brothers, who cleaned, graded, and washed them, sulphured such fruit as had not been sulphured by the grower, and fumigated and packaged it. If it had appeared in that case that Rosenberg Brothers always bought nectarines before they were sulphured but that the ordinary grower customarily sulphured them, the court would presumably have held that the sulphuring operations were "agricultural labor," even though performed by a commercial processor for his own account.

Conversely, were it to appear that the ordinary grower did not customarily sulphur nectarines, the court would have to hold, if the question arose, that the grower who did sulphur them performed non-agricultural labor. It becomes important, therefore,

to decide how it can be determined what the ordinary grower customarily does and who he is. Did the court mean the majority of growers in the district or producing area adjacent to the plant at which their fruits or vegetables are processed, a rather indefinite concept, or in the state, or in the whole country?

If it meant the ordinary producer in the producing area or in the state, it would follow that processing services performed in one part of the country may be subject to the tax, although they are exempt in the rest of the country, merely because the ordinary grower customarily parts with his economic interest in his product in a particular area at a different time than in the remainder of the country. We believe that the intention to provide that what is "agricultural labor" depends on the custom of handling an agricultural commodity prevalent in the vicinity of the processor should not be attributed to Congress without clear evidence of such an intent. If the whole country is meant, then the question whether a particular processing service is nonagricultural labor subject to the tax requires a determination at what point the ordinary grower throughout the entire country customarily parts with his economic interest in his product. These are not matters of common knowledge of which administrative agencies, or even the courts, can take judicial notice. The difficulty of deciding such questions would be much greater than the difficulty of deciding at what point title passes from a single seller to a single buyer.

It is unreasonable, in view of the language and legislative history of this section, to attribute to

Congress an intent to adopt a test of "agricultural labor" so difficult to interpret and administer.

In the *Burger et ux. case, supra*, the court decided, also, that the packing plant of Rosenberg Brothers, where the wage earner's services were performed, was a "terminal market" within the meaning of the statute. The District Court said [p. 624-625]:

Thus Congress has drawn a line of demarcation across the various pathways followed by agricultural and horticultural commodities in passing from producer to consumer, and has declared that once the commodity reaches the market, from which in ordinary course of trade it next goes into the channels of distribution for consumption, any service afterwards performed for any person in treating or handling such commodity does not constitute "agricultural labor" within the meaning of the Act.

The uncontradicted evidence presented to the Board discloses that along the producer-to-consumer route of dried fruit the Fresno packing plant of Rosenberg Brothers is a terminal market. The Company purchases from growers fruit which has been pitted and dried. This fruit is stored and as orders require, the Company packs, sells, and delivers it to wholesale and retail outlets. Burger's services were the beginning step in the Rosenberg process of preparing dried fruit for "distribution for consumption."

The Court of Appeals said that it agreed with the District Court that the Rosenberg Brothers' plant was a "terminal market" for the farmer-producers who sold and delivered their dried fruit to that con-

cern; that it was only after the farmer-producer had sold and delivered his fruit to Rosenberg Brothers and, hence, after all "agricultural labor" in connection therewith had ceased, that the services in question were performed.

If this court's construction of Section 209 (1) (4) were correct, it would be clear that any plant which sorted, graded, processed, packaged, and marketed fruits and vegetables which it had bought from the grower would be a "grower's market" because it bought the fruits and vegetables as well as a "terminal market" because it sold them.

Clearly, either the provision of the first sentence of Section 209 (1) (4) that handling services are "agricultural labor" only if performed "as an incident to the preparation of such fruits and vegetables for market" or the provision of the second sentence that such services are not "agricultural labor" if performed "in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption" would be surplusage. Such a construction should not be favored. This section should be construed so as to give effect to all of its language.

If, as we believe we have shown conclusively, services performed by a farmers' cooperative or commercial handler as an incident to the preparation of fruits and vegetables for market are "agricultural labor," whether or not performed for the account of the grower, it follows necessarily that the plant of such a processor is not a terminal market. For the processor is not a con-

sumer of fruits and vegetables. The only use he can make of them after he has processed them is to sell them to wholesalers or consumers. The purpose of Congress to equalize the tax burden of the small and large growers would be defeated by holding that his plant is a "terminal market" within the meaning of the last sentence of Section 209 (1) (4) just as much as by holding that he is the "market" within the meaning of the first sentence; for the processor would, in either case, be subject to the tax and would shift its burden to the grower.

The only construction which is consistent with the Congressional intent is that a terminal market is the one to which fruits and vegetables are delivered after they have been prepared for market; i. e., after they are in the condition in which they can be sold to consumers. The only services excluded from "agricultural labor" by the second sentence of Section 209 (1) (4) are the additional services performed in the handling, sorting, grading, processing, etc., of fruits and vegetables after the services necessary to prepare them for sale to consumers have been performed.

In *Claim of Lazarus, supra*, the statute was so construed. This case involved the question whether services performed by commercial processors in cleaning beans were "agricultural labor" within the meaning of a section of the State Unemployment Insurance Law identical with Section 209 (1) (4). The beans with reference to which the processor's services were performed were transported to bean elevators, from the farms on which they were grown, by truck. Upon delivery to the elevators, scale tickets were is-

sued bearing the name of the farmer, who was paid the market price for hand-picked beans per pound less the cost of picking them. The result of the picking operations was to clean the beans into the condition required by the regulations of the Department of Agriculture before they could be sold to consumers. After cleaning the beans the processor sold them to canners and jobbers. In holding that the bean elevator was not a terminal market the court said:

The elevator is not a terminal market in the proper sense of the term. A terminal market is the place of business to which products are shipped in a sorted, graded, packaged condition, ready for immediate sale. If the product in the course of shipment reaches a warehouse in its raw or natural state, or partially sorted, but not yet fully processed and approved for public sale according to law, it is not yet prepared and ready for market; the intermediary warehouse, like the elevator is not the "terminal" delivery point for such products. After the product has been further completely processed it is deemed prepared "for market" and then and then only is ready "for distribution for consumption."

The Court of Appeals agreed with the Appellate Division that the bean elevator was not the growers' market and affirmed its decision that the services were not "agricultural labor" without discussing the question whether it was a "terminal market."

We believe that the construction of "terminal market" adopted by the New York courts is the correct one and should be adopted by this court.

The main reasons given by the District Court in the *Burger et ux.* case, *supra*, in support of its construction of Section 209 (1) (4) were:

(1) That the principal reason for excepting "agricultural labor" from the benefit and taxing provisions of the Social Security Act of 1935 were "administrative difficulties and accounting inconveniences in farm work."

It is true that the Supreme Court in *Carmichael v. Southern Coal Company*, 301 U. S. 495, 513, said that:

Relatively great expense and inconvenience of collection may justify the exemption from taxation of * * * farmers, * * * not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax.

It is true, also, that the exemption from the tax of processing plants which would not experience the like difficulty as farmers in maintaining employment records is not justified on that ground. But the committee reports on the Social Security Act Amendments of 1939 show clearly that the reason for the adoption of Section 209 (1) (4), broadening the definition of "agricultural labor" was to equalize the tax burden of the large and small farm operators. The amendment should be construed in the light of its purpose and the mischief at which it was aimed. It has been shown that this purpose would be defeated by the construction put upon the section in the *Burger* case. The reasoning justifying a narrow construction of "agricultural labor" under the Social Security Act

of 1935 cannot justify a narrow construction of the amended definition.

(2) A second reason given by the court was that the Social Security Act should be liberally construed and, therefore, all doubts of interpretation should be resolved in favor of coverage. It is true as a general rule that social legislation, such as the Social Security Act, should be liberally construed so as to accomplish its purpose. But the canon of liberal construction is merely an auxiliary aid to discovering the intention of Congress in doubtful cases and not to thwart it. It cannot be used to justify a construction contrary to the clearly expressed legislative intent. In *Better Business Bureau v. United States*, 326 U. S. 279, 283, in commenting on the taxpayer's argument that exemptions under the Social Security tax provisions should be given a liberal construction, the Supreme Court said:

Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent or that express limitations of such an exemption are to be ignored.

For the same reason statutory words and phrases in a provision granting exemption from a tax should not be given unusual or tortured meanings unjustified by the legislative intent. In the instant case Congress had to choose between the conflicting interests of small farmers in a broad exemption from the tax and the interests of employees of processing plants in eligibility for benefits; i. e., a narrow construction of the

tax exemption and a "liberal" construction on the Social Security Act. Since Congress plainly showed that it intended to choose the former, there is no room for the application of the canon of liberal construction.

(3) The final reason given by the court for its construction in *Burger et ux., supra* (66 F. Supp. 619, 627), was that to exempt packing house activities in processing, for the sole account of the processor, fruit grown by others and sold to it as a commercial packer, would work an exemption of doubtful validity.

We do not believe that the court's construction can be justified on this ground. As has been shown, farmers' cooperatives and commercial handlers were exempted from the tax under the circumstances detailed in Section 209 (1) (4) because of the conviction of Congress that the tax would be borne, not by them, but by the small growers from whom they bought the fruits and vegetables which they processed. The exemption of the processors was merely the means of attaining a legitimate end; namely, that of equalizing the tax burden of small and large growers. Legislation granting farmers and farmers' cooperatives special, favored treatment has frequently been sustained by the United States Supreme Court. See, for example, *American Sugar Refining Company v. Louisiana*, 179 U. S. 89, in which the court held that a statute which required the payment of a licence tax by refiners of sugar, but excepted planters and farmers grinding and refining their own sugar, was held not violative of the fourteenth amendment.

In *German Alliance Insurance Company v. Lewis*, 233 U. S. 389, a law which placed burdensome regu-

lations upon all insurance companies except farmers mutual insurance companies which insured farm property was sustained. In *Smith v. Kansas City Trust Company*, 255 U. S. 180, the court sustained the Federal Farm Loan Act, which consisted entirely of special legislation for farmers.

The exemption of farmers from the operation of workmen's compensation acts (*New York Central R. R. Co. v. White*, 243 U. S. 188; *Ward & Gow v. Krinsky*, 259 U. S. 503) and of women employed in harvesting, curing, canning, or drying of perishable fruits and vegetables from the Women's Eight-Hour Law of California (*Miller v. Wilson*, 236 U. S. 373) were sustained.

Nor is the Social Security Act unconstitutional because it provides that benefits thereunder are payable only to employees of individuals engaged in covered employment, who are subject to the taxes imposed by the Federal Insurance Contribution Act. That question is settled by *Miller v. Wilson, supra*, and *Steward Machine Company v. Davis*, 301 U. S. 548.

The exemptions from the tax of farmers' cooperatives and commercial processors is merely a means to and incidental to the accomplishment of a legitimate purpose. The constitutionality of the exemption is not open to doubt.

II

The instant case is distinguishable from *Miller v. Burger*

In the instant case the referee found from the undisputed evidence that the washing and grading of potatoes was necessary to prepare them for distribution to the consumer. These were the services per-

formed by the plaintiff for Albert Miller and Company. Of similar services the committee reports state:

Under this portion of the paragraph, for example [referring to the first sentence of Section 209 (1) (4)], services performed in the sorting, grading, or storing of fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

No distinction can be perceived between the sorting and grading of fruits on the one hand and the washing and grading of potatoes on the other. The language of the committee reports, above quoted, shows clearly that Congress intended, by Section 209 (1) (4) to provide that such services as sorting, washing, and grading of potatoes were "agricultural labor," no matter by whom or for whose account they were performed. Clearly such washing and grading were incident to the preparation of the potatoes for market. Therefore, the services performed by the plaintiff for Albert Miller and Company were "agricultural labor."

Furthermore, it was not disputed in the *Burger* case, that at the time the growers delivered their dried fruit to Rosenberg Brothers they received the purchase price payable therefor and parted with all their economic interest therein.⁶ In the instant case the growers had not parted with all their economic interest in the potatoes at the time they were washed,

⁶ Rosenberg Brothers was a well-known industry leader which cannot properly be compared with a carlot potato distributor such as appellee.

sorted, and graded by Albert Miller and Company. By the terms of the agreement between the company and the grower the potatoes were to be paid for on the basis of the quantity of the U. S. No. 1 and U. S. No. 2 potatoes in the lot. Since there was a recognized price differential between U. S. No. 1 and U. S. No. 2 potatoes, it was essential to determine by sorting and grading, the amount of each grade in the entire lot purchased by the company in order to determine the price to be paid to the grower. The fact that the price payable to the growers could not be determined until after the services of sorting and grading had been performed shows that the growers retained an economic interest in the potatoes until they had been sorted and graded.

The nature of the transaction was such as to show that the parties contemplated and that the transaction required the performance of services such as those performed by the plaintiff for Albert Miller and Company. The grower, in effect, sold the potatoes to the company, not in the condition in which they were at the time the company took or had the right to take possession, but in the condition contemplated after sorting and grading. Under these circumstances Albert Miller and Company acted as the agent of the growers in washing, sorting, and grading the potatoes and title thereto did not pass to it until such services had been performed. Section 18 of the Uniform Sales Act, adopted by the State of Idaho in 1919, provides that:

- (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the

parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.

Rule 2 of the rules provided by Section 19 for ascertaining the intention of the parties is as follows:

Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done. (See also 2 Williston on Sales [Revised Edition 1948] Section 263, p. 12.)

The same principle is well stated in 46 Am. Juris.—Sales—Section 422, as follows:

In the absence of any evidence of a contrary intention, the general rule is that a sale of personal property is *not* completed while anything remains to be done to determine its quantity and thus its price, as by weighing, measuring, or counting, unless this is to be done by the buyer alone. The reason for this is because ordinarily in such transactions it is the intention of the parties that the title and corresponding risk remain in the seller, until the price is definitely ascertained. * * *

In the absence of any intention expressed by the parties, the law raises a presumption that if something remains to be done for the purpose of testing the property or fixing the amount to be paid by weighing, measuring, or the like, or of putting the property into condition for final delivery, the title

does *not* pass until the act is done. *Wadhams v. Balfour*, 32 Ore. 313, 51 Pac. 642; *Star Brewery Co. v. Horst*, 120 Fed. 246 (C. A. 7); *Meachem on Sales*, Sec. 478. When the identification of the goods consists in the segregation, weighing, or measuring, title does *not* pass prior thereto. *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 Pac. 248. Where the seller has things to do to put the goods sold into deliverable shape, performance of such things by him (herein by the plaintiff, acting for the seller) is usually a condition precedent to the passing of title. *Wanee v. Thomas*, 75 Cal. App. 231, 242 Pac. 509; *Pfoh v. Porter*, 23 Cal. App. 59, 137 Pac. 44; *Mac Rae v. Heath*, 60 Cal. App. 64, 212 Pac. 228; *Walti v. Gaba*, 160 Cal. 324, 116 Pac. 963; *Blackwood v. Cutting Packing Co.*, *supra*. To the same effect, see *Idaho Products Co. v. Bales*, 36 Idaho 800, 214 Pac. 206 (1923); *Wanee v. Thomas*, *supra*.

In the instant case the potatoes were not in a marketable state until they had been sorted and graded. In performing these services, Albert Miller and Company acted as agent for the growers. Therefore, title thereto did not pass to the company until the services had been performed.

The instant case is distinguishable from the *Burger et ux.* case, *supra*, on the further ground that here the potatoes at the time they came into the possession of Albert Miller and Company were, unlike the dried fruit in the *Burger* case, in their natural, unmanufactured state and the services performed in handling them were an integral part of farming operations.

In the *Burger et ux.* case it appeared from the facts as stated by the court (p. 621) that the dried fruit handled by Rosenberg Brothers was not at the time of its delivery to the company in its natural, unmanufactured state. The facts were there stated as follows:

After growing the fruit and harvesting it, the typical farmer hauls it to his cutting shed where his cutters slice the fruit, remove the pits, and then place the halves on drying trays which are then set in the sun. In the case of peaches, apricots, and nectarines the grower-dryer also sulphurs them. The dried fruit is then packed into sweat boxes or sacks and is delivered and sold to the packing company. Apparently, prior to the establishment of modern methods of merchandising, the dried fruit was marketed by the grower to the consumer in substantially the same state of preparation in which it is now, when delivered and sold to the packing company.

The packing company's function was "to receive that fruit, grade it, clean it, wash it, sulphur it, fumigate it, and package it" and sell it. The processing and packaging was done "for appearance sake and for keeping qualities." The court considered that such services were not services incidental to the preparation of the fruit for market and were not an integral part of farming activities.

In the instant case the grower did not handle the potatoes at all after they were harvested and placed in his cellar. They were delivered to Albert Miller and Company in their raw or natural state. As

specifically found by the referee, they were not ready for distribution to the consuming public prior to their washing, sorting, and grading. Washing, sorting, and grading of fresh fruits and vegetables in their natural, unmanufactured state are services generally performed as field activities on the farm in connection with and immediately following and closely related to growing and harvesting. They are farm activities and constitute an integral part of farming operations. The services performed by Rosenberg Brothers in the *Burger et ux.* case were in the nature of nonagricultural merchandizing operations, performed after the dried fruit had lost its original form and natural state and had been prepared for market, and were not an integral part of farming activities.

In the instant case the potatoes could not be sold to consumers until they had been washed, sorted, and graded. The services performed by the plaintiff for Albert Miller and Company of washing and grading potatoes were entirely different from the services performed by the plaintiff in the *Burger* case for Rosenberg Brothers. The *Burger* case did not involve the question whether services similar to those performed by the plaintiff in the instant case were services performed as an incident to their preparation for market.

We believe also that Albert Miller and Company's warehouse at Burley, Idaho, was not a terminal market, even under the statute as construed in the *Burger* case. Unlike Rosenberg Brothers it was not engaged in the business of distributing the potatoes

for consumption. Its principal business was that of washing, grading, and storing potatoes in bulk. Its marketing operations were relatively minor and incidental thereto. Of the potatoes handled by it about sixty percent were sold, not by the warehouse, but at its Chicago office and were shipped pursuant to directions from it. Had they been shipped first to the company's principal place of business in Chicago and from there to its customers, it could not be said that the warehouse was the place where the potatoes accumulated in storage "for distribution into the usual channels of commerce and consumption." The fact that they were shipped directly from the warehouse to the company's customers is immaterial.

The remaining forty percent of the potatoes were sorted and graded in the growers' cellars and were sold to local produce companies, local interstate and intrastate transportation companies, restaurants, stores, and private individuals *without ever entering the warehouse*. As to them the warehouse was clearly not the place where they accumulated in storage "for distribution into the usual channels of commerce and consumption."

As the Appeals Council, in deciding this case, correctly said:

* * * In our opinion, the operations of the Burley warehouse must be considered as a whole and the fact that sixty percent of the potatoes bought through that warehouse were sold to wholesalers and dealers located at points far distant supports the conclusion

that such points, rather than the Burley warehouse, constituted the "terminal market" for its output, within the meaning of the Act. If it is considered proper to consider the local sales made at Burley separately from the total, it would seem also that consideration should be given to the fact, which is established by the record, that the services performed by the claimant, as stated in the referee's decision, "consisted of approximately forty-five percent in washing operations and fifty-five percent in grading operations at the Burley warehouse." Since the new evidence submitted by the claimant shows that neither of these operations was performed in the warehouse respecting potatoes sold locally, the conclusion would seem to be inevitable that his services related solely to the potatoes (sixty percent of the total handled) which were shipped directly or indirectly to wholesalers and dealers located at distant points from Burley, Idaho, and that his services, therefore, were performed prior to the delivery of the potatoes to a terminal market, and "as an incident to the preparation of such * * * vegetables for market" (Supp. Tr. 77-78).

III

If the Facts Found by the Administrator do not Support His Conclusion Herein, the Case Should be Remanded to Him With Directions to Take Additional Testimony and Make Additional Findings of Fact

We believe that we have shown that it is immaterial, in the instant case, whether title to the potatoes handled by Albert Miller and Company passed to

it before or after they were sorted and graded by it; nor is it material at what time or place or in what condition the ordinary potato grower customarily parts with his economic interest in his potatoes. We have shown also that the warehouse of Albert Miller and Company is not a terminal market within the meaning of Section 209 (1) (4) of the Social Security Act. If, however, this court should be of the contrary opinion, we respectfully suggest that it remand the cause to the Administrator with directions to take additional testimony on the basis of which the facts necessary to a decision of this case may be found.

At the hearing before the referee, which took place before the *Burger et ux.* case was decided by the District Court, it was assumed that "preparation for market" meant preparation for sale to consumers and that it was immaterial whether Albert Miller and Company acquired title to the potatoes before or after they were sorted and graded. Consequently, the referee made no finding on the question whether there was a variation in price between U. S. No. 1 and U. S. No. 2 potatoes; whether, under the agreements between Albert Miller and Company and the growers whose potatoes it handled, the former paid for them before or after they were sorted and graded; whether the price paid by the company was the price of graded potatoes less its fee for washing, sorting, and grading them, or the price of unwashed and ungraded potatoes. Nor does the record disclose in what form or condition potatoes are customarily sold or disposed of by the ordinary producer or grower.

While the referee said that "It is customary in the production of potatoes in the district in which the company's warehouse is situated for the farmers to harvest their potatoes and place them in storage cellars.", there is no finding as to how widespread is the custom of selling potatoes before they are washed, sorted, and graded.

The record does not disclose the dimensions or locations of the district referred to by the referee; whether there were any other warehouses within a reasonable distance of Albert Miller and Company which bought, washed, sorted, and graded potatoes; and whether or not other potato warehouses or handlers in Idaho or elsewhere bought potatoes on the same conditions as Albert Miller and Company. There is a complete absence of evidence as to how potatoes were handled outside of the district in which the company's warehouse was located from which it could be determined how or when or in what condition the ordinary potato grower customarily parts with his economic interest in his potatoes. We believe that if that is material, it depends on what the majority of growers all over the country customarily do. In the instant case the record does not contain the evidence necessary to make findings on these facts. If the court believes that they are material to the decision of this case, it should remand the cause to the Administrator for the purpose of taking testimony and making findings of fact with respect to them. Cf. *P. M. Barger Lumber Co. v. Whitehouse et al.*, 182 F. (2d) 775, 779 (C. A. 9, 1950).

We believe, therefore, that unless this court overrules *Miller v. Burger*, it should (1) state more clearly

than it has done heretofore what it meant by "all services performed for the account of the producer or grower in connection with * * * preparation of the commodity for and delivery to a producers' or growers' market in the form or condition in which such commodity is customarily sold or disposed of by the ordinary producer or grower thereof;" (2) that the cause be remanded to the Administrator with directions to find the facts on the basis of which the questions of law and fact involved herein can be decided.

CONCLUSION

For the reasons hereinabove stated, this court should reverse the judgment of the District Court with directions to enter judgment for the defendant or should remand the cause to the Administrator with directions to take additional testimony and make additional findings of the fact on the issues which it now holds to be material to the decision of this case.

Respectfully submitted.

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APPENDIX A

Extracts from the testimony introduced at the Hearings Relative to the Social Security Act Amendments of 1939 Before the Committee on Ways and Means, House of Representatives, 76th Cong., 1st Sess.

Extract from statement of Samuel Fraser, Representing the International Apple Association (pp. 1681-1682).

In the case of the fruit and vegetable grower the apple on the tree or the vegetables in the field are of no value until they are put in position to ship. In the case of apples, in order to meet food and drug requirements, the spray must be taken off to a point that will meet the tolerance established by law. That may necessitate washing. They must be packed and marked to conform with United States grades to meet the requirements of the United States Bureau of Agricultural Economics grade regulations. They also must be marked to meet the food and drug requirements. To meet present conditions this involves machinery and competent and skilled help. It involves, in the case of a washer for apples at least 5,000 gallons of water every 10 hours, and that must be available in the fall when water is often at a premium.

Now, the larger grower under the definition which is given by the Bureau of Internal Revenue of agricultural labor under the Social Security Act, packing on his own farm may be in a position to establish washing and packing machinery, but the smaller grower is absolutely unable to pack, wash, and prepare for market himself. Therefore a number of them may

either group together to get the work done, or they may sell the commodity to someone who does it. In either of these cases the Bureau of Internal Revenue holds that these latter people are subject to the excise tax.

* * * *

In other words, the right is given in the present regulation, paragraph (b), to the owner or tenant of a large farmer to pack, package, prepare for market, transport or market the products of said farm, lines 2 to 5.

We want the same rights extended to a group of average producers to get together to prepare their crops for market and have the same opportunities the larger unit now possess.

Extract from the brief of the International Apple Association (pp. 1697-1698).

It is important to remember that *neither the farmer himself*, working his farm and bearing all the burdens of costs incurred in preparing the crop for market and even the transportation charge to market, *nor the labor he employs on the farm*, participate in any of the benefits of this law, but under the present definition and regulation, where the packing and preparation for market are done outside the farm premises, they will be taxed to support benefit payments to others. In much of the agricultural area the possible returns from agriculture are so meager that a tax which will ultimately be 10 percent of the payroll, against which it lies, will but further reduce the returns of a group already inadequately recompensed for the work they render society. It is not social security.

The definition has aroused the most grave apprehensions as to the serious consequences to agriculture.

To illustrate: To produce and turn into money an apple or pear crop, it must, among other things, be pruned, cultivated, fertilized, sprayed, picked, graded and packed and in

many instances washed or brushed. As to washing, the fruit in some cases has to go through two baths, an alkali wash and an acid wash. This necessitates costly machinery, an adequate water supply, a proper method of disposal for the effluent. The average small grower cannot individually perform the work, and, by and large, he cannot equip himself with expensive grading machinery. Under the present regulation, if say five, twenty, or any number combine to erect a packing house, install a washer and purchase grading machinery and then proceed to pack their fruit, they are taxed on the labor employed. In many instances it is not practical for even a large grower, much less a small one, to purchase all of these facilities in view of the uncertainty of a crop from year to year. For example, this year many growers had their entire crop destroyed by spring frosts. In another district, owing to climatic and other conditions, washing may not be necessary and the fruit may be packed on the farm by the producer, without washing.

Again, in the latter instance, it may be advantageous to the small producer to have his fruit packed in a neighborhood packing plant, at a fixed charge per package, rather than attempt to organize both a harvesting and packing crew on his own farm, with the inability of the owner to be in the orchard and the packing shed or house at the same time. Competent packing crews are not easy to get together for a limited tonnage and short employment. Uniformity of grade and pack are essential for the best results.

It should be self-evident that apples or pears hanging on the trees in an orchard are of no value to the grower if they continue to hang there. Something *more* has to be done at point of origin and within the area of production be-

fore the consumer will purchase them and before value can be obtained by the grower. Those necessary additional things are: The fruit must be picked, washed, or brushed when necessary, and graded and packed ready for transportation and delivered to one type of carrier or another. *These acts are all a part of production* just as much as spraying, pruning, fertilization, cultivation, etc.

Formerly they were *all* done on the individual farm or ranch. That can no longer be done. The various steps are too expensive for many growers in view of the uncertainty of the crop or the small volume produced by many of them.

Analyze these steps still further. The fruit is picked from the tree. The labor up to and including that act is now, under the present ruling, agricultural labor. But the picking is still not sufficient. Before the grower can obtain value for his crop, the additional steps of washing or brushing, when necessary, grading and packing, and delivery for shipment must be performed by the grower or by someone acting in his behalf. *And in every single instance the expense of those steps comes out of the pocket of the producer.* Make no mistake about that. If he hires someone either on or off the farm to perform those acts, the grower pays. If someone purchases the fruit with those acts unperformed, the price paid must obviously take those unperformed acts into consideration. The cost of all of those acts comes out of the grower's pocket.

If all of these things are done by the grower *on his own ranch or farm*, he is exempt under the present ruling.

Now then, *if he moves the fruit even a few rods away* from his farm to a central packing plant (whether cooperative or otherwise) *and where the same identical steps are taken as in the first instance*, he is no longer exempt.

This creates an illogical, incongruous, and discriminatory situation entirely unwarranted by the facts.

* * * * *

Second: If he does not select the above method, then he must pay a specific tax on the labor in a central or community packing house, because, most assuredly, this tax will be added to the packing charge.

Whichever method he selects, he will in effect be taxed, *first*, by the expense of equipping himself to do the work, or, *second*, by paying an *out-and-out tax* if he employs someone else to do it.

To restrict by definition and interpretation the term "agricultural labor" to the labor actually performed on the farm itself is an unwarranted violation of the intent of this legislation, contrary to the recognized facts and contrary to the development of agriculture.

The law specifically exempts "agricultural labor." We have shown that the whole process from the bud to the final washing, brushing, grading, and packing at the point of production is all part of one process before the grower can obtain value for his product. This was positively and jointly recognized by Agricultural Adjustment Administration and National Recovery Administration. Their definition was [*italics ours*]:

"Agricultural workers are all those employed by farmers on the farm where they are engaged in growing and preparing for sale the products of the soil and/or livestock; *also*, all labor used in growing and *preparing perishable agricultural commodities for market in original fresh form.*"

This is confined to point of production or the area of production. We have never contended that it applied or should apply to repacking in consuming markets.

To say that "agricultural labor" stops with the picking of the fruit and leaving it in crates, boxes, or piles on the farm, unwashed, unsorted, or ungraded and not packed, unless the grower does those things himself on the actual farm, is to ignore facts, realities, and the essential steps that fruit growers have had to take in the evolution of production.

We understand that the point has been made that the charge for washing, brushing, grading, and packing in a central packing house would *not* be borne by the producer. It absolutely is and would be borne by the producer and no one else. *And if this tax has to be paid on the labor in a packing house, the grower will pay that.* Not only that, but if the grower sells without performing these acts, then whoever stands in the grower's shoes discounts the price sufficiently to take care of these charges.

The grower is caught going and coming *under the present definition*. If he packs on the actual farm itself, he must equip himself at no small expense and often with lessened efficiency. If he has it done in a central packing house, he pays a tax. In either case the grower pays the bill. Furthermore there is no possibility of the grower passing these taxes on.

There is greater misconception and lack of knowledge about "*passing costs on*" to somebody else or the consumer *in the case of perishable commodities* than almost any other subject. In the case of a perishable, costs *cannot be passed on*. In the last analysis they come out of the grower's pockets. The commodities are *perishable*—they cannot be held from year to year like furniture or any other nonperishable. They have to be sold *for what they will bring*.

Therefore, every additional charge you put on these commodities is a penalty on the grower.

Extracts from brief submitted by Ivan G. McDaniel, representing the Agricultural Producers Labor Committee (pp. 2041-2043).

The great majority of farm products produced in California and Arizona are either produced and shipped by the farmers directly or through independent packing houses who handle the products for the account of the farmer, or through farmer-owned cooperative packing houses, handling the fruit of its members only. These cooperative packing houses, and in many cases the independent packing house, harvest the products for the farmer, wash, grade, and pack the commodity in such a manner as is required by law, or by good commercial practice. In the cooperative associations the products are generally not sold by the local association which harvests and prepares the crops for market, but after being packed, are turned over to another cooperative which acts as the sales agent therefor.

In these cooperative associations, the products of all members are pooled and after the returns are received, the actual cost of operations, including the labor employed, are deducted from the returns, and the balance distributed to the members. Actually the individual member pays the labor employed in handling the fruit. In many instances the identity of the grower's fruit is not lost as it passes through the house. The associations not only employ the workers used in cleaning, grading, and packing the fruit, but in most instances employ the labor used to pick the fruit on the member's ranch. The association acts as agent for the grower in harvesting and preparing the crops for market; the growers elect a board of directors from their number and the association is entirely controlled by the growers. The character of the product is not changed as it passes through the packing house and when packed is still in its raw or natural

state; the packing houses are located near the farms of its members and furnish the necessary washing equipment which the individual farmer could not afford to buy; they employ the farmers, and the farmers' daughters and sons, and agricultural workers from the nearby community and there is a general practice of exchanging labor between the packing houses and the orchards or vineyards.

The State laws, and good commercial practice, require that the commodities be washed, graded, and packed before they may enter into commercial channels, and the farmer is unable to obtain anything for his product until this work is completed. This work is closely connected to and is an integral part of production operations. The packing house is not an independent commercial endeavor in which the grower is engaged, but is organized to render service which the grower himself would perform on his own ranch were it not for the fact that by the cooperation of several growers the necessary equipment can be obtained and a better grade fruit prepared for market. On the average, the investment of the grower in his packing house is only approximately 4 percent of the investment in his groves. The products after being prepared for market are sold at wholesale and not at retail. The equipment used in these packing houses is not like those used in manufacturing operations where the product is changed in form. The associations generally handle the product from the farms of its own members exclusively. It is and has been for many years a general custom and practice in the fresh fruit and vegetable industry to perform the handling operations in question in order to prepare the products for market.

Where the fruit is handled by an independent establishment the farmer is required to bear the cost. In case the fruit is handled on consignment or upon per unit packing cost incurred by the packing house is deducted

from the funds received from the sale of the fruit. In case the independent operator buys the fruit from the grower, it is the general practice for him to take into consideration and deduct from the price paid, his cost of packing and handling the fruit. It appears from these facts, that the labor used in these packing houses, whether cooperatively or independently owned, and handling the fruit for the account of the grower, is clearly agricultural in nature. Applying the Treasury Department's own tests, as laid down in Digest S. S. T. 125, XVI-14-8630 would establish this fact.

* * * * *

The rulings issued by the Bureau of Internal Revenue are discriminatory. The labor used in a cooperative packing house, where the oranges are cleaned, graded, and packed is not exempt whereas the same labor used in a packing house on the individual farmer's land, employed by the farmer, doing the same kind of work is exempt. This gives the large farm operator a decided advantage over the small operator. The small farmer cannot afford the facilities necessary to handle and pack his fruit, and is therefore required to join a cooperative association where such equipment can be made available. The large farmer on the other hand who has sufficient volume and the funds necessary therefor, can acquire and operate his own packing house. The average-sized citrus grove in a cooperative association in California is approximately 12 acres. The quantity of fruit produced on 12 acres is not sufficient in volume, nor does the fruit bring sufficient returns to permit such a farmer to acquire and operate his own packing facilities.

On the same principle the labor used to pick fruit when employed by a cooperative association is not exempt, whereas the labor employed by a farmer, doing work on the same farm, is exempt. We thus have the anomalous situation

where a workman picking fruit on one part of a ranch, is exempt labor, whereas another workman doing the same work, for the same farmer, on the same ranch, is not exempt.

In many of the cooperative associations, their bylaws or articles, provide that the association is the agent of or trustee for the farmer member, in handling the fruit and the funds realized therefrom. In the ruling made (see (f) of par. II above) the Bureau ruled that where the labor was employed by the marketing agent, it was agricultural labor, if the grower by contract appointed the marketing agent, as the agent of the grower in employing the labor used to pick the fruit of the grower. We contend it makes no difference whether this agency relationship is created by contract or by the bylaws, the same principle should apply. However, as we shall hereafter point out, the factor of agency is not material.

* * * * *

(p. 2046) Under present conditions the producers of fresh fruit and vegetables cannot pass on any added tax or labor costs. Their operations are seasonal and when production is at its peak, these producers use the greatest quantity of labor. At that time the quantity of products available for shipment generally forces the prices down to its lowest point so that the farmer when he is getting the lowest price for his products is required to hire the largest number of persons. Furthermore, during the beginning and ending of a particular season there are competing agricultural commodities which generally force the price to a level where the tax cost must be borne by the farmer. Another thing that prevents the farmer passing on his labor and tax costs is that his commodities are perishable and must be moved into market regardless of price or regardless of the quantity of price of competing products. Thus when navel oranges may be

moving from California, large quantities of oranges are moving from Florida and a large quantity of apples are being shipped from various States. The quantity and price of apples, peaches, pears, etc., then competing directly, affect the price on oranges.

The surpluses of fresh fruits and vegetables produced each year have a tendency to keep market prices down and prevent the farmer passing on added costs. As soon as the prices reach a point which cover the production cost plus the cost of shipping, more and more of the surplus is put into the market so that the price has very little chance of reaching a point above the actual cost of production. Furthermore, when surpluses are available there is a tendency on the part of dealers to bid less and buy less. It is what is generally referred to as a buyer's market. The farmer is almost helpless to prevent these surpluses arising. Because of his meager income he must keep his entire property in production to produce a bare living. If the weather is bountiful a surplus is produced and the consumer is generally benefited by lower prices. If growing conditions are adverse due to frosts, winds, dry spells, pests, or other causes the quantity is reduced and the price correspondingly increased. But if the farmer attempted to reduce his plantings and adjust them to the anticipated normal demand and then adverse weather or growing conditions occurred, market famines might result to the great detriment of the consuming public. It is often possible with nonperishable crops to regulate plantings and hold surpluses in storage to prevent shortage through adverse growing conditions. This however cannot be done with seasonal or perishable commodities. Therefore any costs which are added to the farmer's operations, either through social-security taxes, or increased labor costs, must be borne by him.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

Title II, Section 205 (g) of the Social Security Act as amended, 53 Stat. 1370, reads as follows:

Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a)

hereof, the court shall review only the question of conformity with such regulations, and the validity of such regulations. The court shall, on motion of the Board, made before it files its answer, remand the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony, upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

Title II, Sections 209 (a) and (b) of the Social Security Act as amended (42 U. S. C. 409 (a) and (b), 53 Stat. 1373), read in pertinent part as follows:

DEFINITIONS

When used in this title—

(a) the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of this chapter prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of what-

ever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either * * * except—

(1) Agricultural labor (as defined in subsection (1) of this section; * * *

Title II, Section 209 (1) of the Social Security Act as amended (42 U. S. C. 409 (1), 53 Stat. 1377) provides as follows:

(1) The term “agricultural labor” includes all service performed—

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, stor-

ing, or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

Social Security Administration Regulations No. 3 (Title 20, CFR, 1940 Supp., Part 403, Section 403.808 (e)) provides as follows:

(e) *Services described in section 209 (1) (4) of the Act.*—(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of any agricultural or horticultural commodity, other than fruits and vegetables (*see* subparagraph (2) below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

Generally services are performed "as an incident to ordinary farming operations" within

the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed "as an incident to ordinary farming operations."

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in subparagraphs (1) and (2), above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the excepted service described

in such subparagraphs must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

No. 12523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR R. EWING, FEDERAL SECURITY
ADMINISTRATOR,

Appellant,

vs.

ARCHIE F. McLEAN,

Appellee.

Brief of Appellee

On Appeal from Judgment of the United States District
Court for the District of Idaho, Southern Division.

HONORABLE CHASE A. CLARK, *District Judge*

FILED

S. T. LOWE,
Attorney for Appellee,
Residing at Burley, Idaho.

OCT 16 1950

PAUL P. O'BRIEN,
CLERK

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Brief of Appellee

STATEMENT OF THE CASE

Archie F. McLean, a laborer, who attained the age of sixty-five years in 1945, made application to the Bureau of Old Age and Survivors Insurance of the Social Security Board for benefits under the insurance provisions of the Social Security Act. The Bureau refused to allow credits for services performed by him for Albert Miller and Company at Burley, Idaho. McLean then filed a request for a hearing before a referee of the Social Security Board. A hearing was had (at which McLean was not represented) at Burley, Idaho, on March 26, 1946, and thereafter a deposition was taken before one Oscar M. Sullivan in Chicago, Illinois, at the taking of

which McLean was not represented. The referee rendered his decision disallowing credits for the services performed by the appellee for Albert Miller and Company at Burley, Idaho, during the years of 1941 and 1942. From this decision, McLean (still being unrepresented) filed an appeal to the Appeals Council and, on July 2, 1948, the Appeals Council affirmed the ruling of the referee and refused to allow credits for the services performed by the appellee for Albert Miller and Company in the years 1941 and 1942. Thereafter McLean instituted this action under the provisions of subsection (g) of Section 405, Title 42, U. S. C. A.

By his amended complaint he alleges that he earned, during the calendar quarter ending December 31, 1941, the sum of \$110.25; during the calendar quarter ending March 31, 1942, the sum of \$257.33; during the calendar quarter ending June 30, 1942, the sum of \$141.35; during the calendar quarter ending September 30, 1942, the sum of \$133.12; during the calendar quarter ending December 31, 1942, the sum of \$356.98, and during which time the plaintiff was employed by Albert Miller and Company in Burley, Idaho, and that the services rendered by the plaintiff to Albert Miller and Company during the periods aforesaid were as follows:

- (a) feeding potatoes into sorter and washer;
- (b) working on sorting table;
- (c) removing bags from sorting machines; and
- (d) assisting in loading railroad freight cars and as-

sisting in loading trucks and other vehicles from the warehouse.

That he performed four full quarters of work for and on behalf of Albert Miller and Company at its warehouse at Burley, Idaho, and, in addition to the services rendered by the plaintiff to said Albert Miller and Company, the plaintiff performed services for other employers, which employment was covered by the Social Security Act, constituting thirteen (13) quarters on the 20th day of November, 1945, at which time the plaintiff ceased to be employed and upon said date the plaintiff was eligible to the benefits of the Social Security Act.

He further alleged that he made application to the Social Security Administration for the benefits accruing to him under the provisions of the Social Security Act by reason of his employment for the period of seventeen (17) quarters prior to ceasing his employment and after having reached the age of sixty-five years.

That thereafter a hearing was had upon the appellee's application for benefits under the Social Security Act and, on the 8th day of July, 1946, Martin Tieburg, referee, held that the appellee was not entitled to receive the benefits of the Social Security Act for the reason and upon the ground that the services performed by the appellee for Albert Miller and Company were exempted from the Social Security Act under the provisions of Section 209 (1) (4), 42 U. S. C., and that the warehouse of Albert Miller and Company in Burley,

Idaho, where the plaintiff was employed, did not constitute a terminal market within the meaning of that section of the Social Security Act and that the operations performed by the company in its Burley warehouse were performed as an incident to the preparation of potatoes for market.

Plaintiff further alleged that Albert Miller and Company at Burley, Idaho, was engaged in the business of purchasing potatoes from farmers for the purpose of reselling, either in inter-state commerce or locally, from its warehouse at Burley, Idaho, and that after the purchase of the said potatoes from the farmers, Albert Miller and Company transported said potatoes to its warehouse at Burley, Idaho, where said potatoes were sorted, washed, sacked according to grade, and thereafter resold by Albert Miller and Company, either in inter-state commerce or locally; and that at the time the plaintiff performed his services for and on behalf of the said Albert Miller and Company, the farmers had parted title in said potatoes and had no further interest therein, and that the warehouse operated by the said Albert Miller and Company at Burley, Idaho, was both a "growers market" and a "terminal market" within the provisions of Section 409 (1) (4), Title 42, U.S.C.A., and that the said warehouse was a place where the farmers customarily parted with all their economic interest in said potatoes, their future form or destiny, and that when the said potatoes reached the said warehouse, the said warehouse was then in the practical control of Albert Miller and Company, a selling organization, and that the said Albert Miller and Company operated the said warehouse at Burley, Idaho, as a purely commercial operation in the business of

buying potatoes from farmers and thereafter selling said potatoes for private profit, after the said company had sorted, cleaned, packed, and otherwise processed the said potatoes, and that the services performed by the plaintiff during the period of time alleged were not "agricultural" services within the meaning of Section 409 (1) (4) of the Social Security Act, Title 42, U.S.C.A.

That the decision of the Appeals Council of the Social Security Administration of the United States rendered on the second day of July, 1948, was contrary to law in refusing to compute the monthly benefits payable to the plaintiff under the Act and to declare the plaintiff to be eligible thereto, and in eliminating as excepted employment under the Social Security Act the services performed by the plaintiff for Albert Miller and Company at its warehouse at Burley, Idaho, and prayed that the decision of the Appeals Council of the Social Security Administration of the United States be reversed and this cause be remanded with directions to the said Appeals Council to compute the benefits to which the plaintiff is entitled under the Social Security Act and in so doing to include the payments, amounting to \$999.03, made to the plaintiff by Albert Miller and Company in the alleged quarters as a part of his total wages in determining the amount of his primary insurance benefits, as provided by Section 409 (e) (f), Title 42, U.S.C.A., and that the plaintiff be declared to be entitled to the benefits of the Social Security Act from and after the 20th day of November, 1945, and for such other and further relief in the premises as equity and the court should deem appropriate.

POINTS AND AUTHORITIES

I.

The appellee, Archie F. McLean, was not engaged in agricultural labor during the last quarter of 1941 and the year 1942, for

A. The services were not performed as an incident to ordinary farming operations.

Supp. Tr. 138.

Supp. Tr. 141.

Supp. Tr. 157.

B. The services were not performed as an incident to the preparation of vegetables for market, because

1. Appellee was employed by Albert Miller & Co.

2. Albert Miller & Co. was not engaged in farming or farming operations.

Supp. Tr. 140.

3. Albert Miller & Co. was engaged in buying, storing and selling potatoes as a commercial business, for profit.

Supp. Tr. 84.

Supp. Tr. 90.

Supp. Tr. 115.

Supp. Tr. 116.

Supp. Tr. 138-139.

Supp. Tr. 153-154.

Cowiche Growers. Inc. vs. Bates, (Wash.) 117
Pac. (2nd) 624.

4. The potatoes had been prepared for market and had entered the commercial market prior to the time that the appellee did any work on them, because

(a) The potatoes were sorted into U. S. No. 1 and U. S. No. 2 grades before they entered the Miller warehouse.

Supp. Tr. 113.

Supp. Tr. 157-158.

Supp. Tr. 155

(b) The title to the potatoes had passed to Albert Miller & Co. before they entered the warehouse.

Supp. Tr. 154-155.

Supp. Tr. 158.

Supp. Tr. 162.

Supp. Tr. 114.

Johnson vs. Besoyan, (Cal.) 193 Pac. (2nd) 63.
Idaho Code, Sec. 64-203.

(c) When the product of the soil leaves the farm, as such, and enters a factory for processing and marketing it has entered upon the status of industry.

North Whittier Heights Citrus Ass'n. vs. National Labor Relations Board, 109 Fed. (2nd) 76.

In Re Yakima Fruit Growers Ass'n., (Wash.), 146 Pac. (2nd) 800.

California Employment Comm. vs. Butte County Rice Growers Ass'n., (Cal.), 154 Pac. (2nd) 892.

(d) Warehouse crews which go to different farms and to dealers' warehouses and prepare potatoes for movement into market are not agricultural laborers.

Idaho Potato Growers vs. National Labor Relations Board, 144 Fed. (2nd) 295.

II.

The warehouse owned by Albert Miller & Co. at Burley, Idaho, was a terminal market for potatoes, for

A. Albert Miller & Co. purchased and owned all potatoes that were taken into, stored, graded and sorted in its warehouse.

Supp. Tr. 113-114.

Supp. Tr. 158.

Miller vs. Burger, 161 Fed. (2nd) 992.

Miller vs. Bettencourt, 161 Fed. (2nd) 995.

Idaho Potato Growers vs. National Labor Relations Board, 144 Fed. (2nd) 295.

Producers Crop Imp. Ass'n. vs. Dallman, 178 Fed. (2nd) 66.

B. Albert Miller & Co. sold to consumers the potatoes that it purchased and stored and sorted in its warehouse at Burley.

Supp. Tr. 115.

Supp. Tr. 117.

Cowiche Growers, Inc. vs. Bates, (Wash.) 117 Pac. (2nd) 624.

In Re Yakima Fruit Growers Ass'n., (Wash.) 146 (2nd) 880.

C. The farmer or grower had no control over the potatoes after they were delivered to the Miller warehouse.

Supp. Tr. 114.

Latimer vs. United States, 52 Fed. Supp. 228.

South Dakota Wheat Growers Ass'n. vs. Farmers' Grain Co., (S. D.) 237 N. W. 723, 725.

Cowiche Growers, Inc. vs. Bates, (Wash.) 117 Pac. (2nd) 624.

III.

In construing legislation such as the Social Security Act, it is axiomatic that the court should be liberal in its interpretation, and it is free to make its own determination of the scope of the statute.

Baiocchi v. Ewing, 87 Fed. Supp. 520.

Social Security Board vs. Nierotko, 327 U. S. 358;
66 S. Ct. 637; 90 L. Ed. 718.

IV.

The case should not have been remanded to the Administrator to take additional testimony or make additional findings of fact, for

A. The Court may affirm, modify or reverse the decision of the Board (Administrator) with or without remanding the case for rehearing.

Title 42 U. S. C. A., Sec. 405 (g).

Patton vs. Federal Security Agency, 69 Fed. Supp.
282.

ARGUMENT

STATUTES

This action was brought under the provisions of subsection (g) of Section 405, Title 42, U. S. C. A., which provides as follows:

“(g) Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board as a decision is rendered under subsection (b) hereof which is adverse to an individual who was party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review

only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Board made before it files its answer, remand the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."

The services that were performed by Albert Miller & Co. at its warehouse at Burley during the years 1941 and 1942 were not exempted employment under the provisions of subsection (1) of Section 409, Title 42, U. S. C. A., which provides:

"(1) The term 'agricultural labor' includes all service performed...

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 1141j (g) Title 12, as amended, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supply and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures

used primarily for the raising of agricultural or horticultural commodities, and orchards."

THE APPELLEE'S EMPLOYMENT WAS NOT EXCEPTED EMPLOYMENT.

Under the provisions of this subsection, before services in connection with the production of potatoes can be classed as exempted employment it must appear that such services were performed as an incident to ordinary farming operations or as an incident to the preparation of an agricultural commodity for market, before its delivery to a terminal market for distribution for consumption.

It is conceded that Albert Miller & Co. owned no land, leased no land and had no contracts for potatoes and was not engaged in farming. The appellee was employed and paid by Albert Miller & Co. and his services were not performed as an incident to ordinary farming operations.

Albert Miller & Co. was engaged in the commercial business of buying and selling potatoes. It purchased all the potatoes that it handled either from farmers or other dealers, all of which were sorted into grades U. S. No. 1 and U. S. No. 2 before they were transported to its warehouse at Burley. Albert Miller & Co. either transported or paid for the transportation of the potatoes from the farm to its warehouse. After they arrived at the warehouse, they were either stored for later sale, or were washed, resorted and classified, or sold without being washed, resorted or classified, as Albert Miller & Co. saw fit or deemed to be to its advantage.

The appellee performed no work upon or in connection with the potatoes while they remained upon the farm or in transporting the potatoes from the farm to the warehouse. His services were performed after the potatoes arrived at the warehouse.

In the case of *Idaho Potato Growers vs. National Labor Relations Board*, 144 Fed. (2nd) 295, it was held that cellar-warehouse crews which go to different farms and to dealers' warehouses and prepare potatoes for movement into market, are not agricultural laborers, excepted from definition of "employee" in the National Labor Relations Act. National Labor Relations Act, Sec. 2 (3), 29 U.S.C.A., Sec. 152 (3).

The farmer growers were entirely independent of Albert Miller & Co., and had no control over the potatoes after they were delivered to it upon the farm.

In the case of *Latimer vs. United States*, 52. F. Supp. 228, the Court said, "The fruit growers who are engaged in the care, cultivation, picking and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the grower to the plaintiff for processing, grading, packing and marketing then the exemption ceases. The plaintiffs engaged in processing, grading and packing and marketing the fruit are engaged in industry and are therefore subject to the provisions of the Act and are not exempt as being engaged in agricultural labor. * * * Thus the stage of operations at which such services cease to be an incident to ordinary farm-

ing and become incidental to the commercial operations of the packing house is reached after the fruit has been picked and upon actual delivery of the fruit to the employees of the association for transmission to the packing house. The service of such employees then loses its 'agricultural' nature and is industrial in character and is an 'off the farm' incident to the business of the co-operative packing house as distinguished from farming operations."

In *Miller vs. Bettencourt*, 161 F. (2nd) 995, the Court said: "When this producer sold and delivered his product to this (Rosenberg) market he parted with all economic interest in it, and in its future form or destiny. This being true, as a matter of law, the labor of the appellee in the Rosenberg plant was not 'agricultural labor,' and the compensation she received from her employer was 'wages' within the meaning of the Act. Title 42 U.S.C.A., Sec. 409."

Not only have the federal courts within the Ninth Circuit so determined and defined what is and what is not agricultural labor, but the same has been defined by state courts under statutes defining agricultural labor similar to the definition by the federal statute. In the case of *Cowiche vs. Bates*, (Wash.), 117 Pac. (2nd) 624, the Supreme Court of Washington held that services performed by employees engaged in receiving, washing, sorting, packing and storing fresh fruits do not constitute "agricultural labor" within the provisions of the unemployment compensation act exempting agricultural labor from the operation of that act. The Court said, "When the product of the soil leaves the farmer, as such, and

enters a factory for processing and marketing it has entered upon the status of 'industry'."

This decision was attacked in the case of *In re Yakima Fruit Growers Ass'n.*, (Wash.) 146 Pac. (2nd) 800. The respondents in the Yakima case contended that *In re Wenatche Beebe Orchard Co.*, 16 Wash. (2nd) 259, 133 Pac. (2nd) 283, 284. (a case cited and relied upon by the appellant) either overruled or modified the Cowiche case. The Court said, " * * * the Cowiche case was an en Banc decision, while the Beebe case was a departmental holding. The rule of decision declared in the Cowiche case is binding on this court until authoritatively overruled. * * * The Beebe case does not, and was not intended to, authoritatively overrule the earlier decision in the Cowiche case." In the Yakima case the Court said: "When agricultural or horticultural products leave the farmer or grower, as such, and are brought to an independent factory or packing house for processing, grading, packing, and marketing, such products thereupon enter the status of 'industry,' and the services performed by the employees of the manufacturer or packing organization in processing, grading, packing, and marketing the fresh or raw products are not to be classed as 'agricultural labor' within the meaning of Section 19 (g) (6) (i) of Chapter 162, Laws of 1937, as amended by Section 6, chapter 214, Laws of 1939, but rather, are to be classed as employment in industry."

It follows that the services of the appellee for Albert Miller & Co. were not agricultural but were commercial,

performed for a commercial organization, engaged in handling agricultural products commercially, and that when the potatoes entered its warehouse they had entered commerce, and the producer had no control over their future form or destiny.

ALBERT MILLER AND COMPANY'S WAREHOUSE WAS A TERMINAL WAREHOUSE.

As used in the statute, a terminal market is a growers' market, the place where or the point of time when the grower of the crop parts with his economic interest in the product and control over its future form or destiny. *Miller vs. Burger*, 161 F. (2nd) 992.

Albert Miller & Co. was a private corporation, organized under the laws of the State of Illinois, to conduct purely commercial operations in the business of buying from farmers and thereafter selling the purchased product for its private profit after processing it.

The appellee testified: "These potatoes were bought by Albert Miller & Co. from the growers and they sent a crew out and sorted them U. S. No. 1 and No. 2. I didn't have anything to do with that. They went out here to the country and bought these potatoes U. S. No. 1 and No. 2 in the farmer's cellar, and paid him for them No. 1 and No. 2. They belonged to Albert Miller. They were out of the hands of the grower entirely. Then Albert Miller brings them into this warehouse where I worked, run them through the wash-

er, sorts them and repacks them, some of them in 100-pound sacks, and the big ones, the 8- and 10-ounces, put those in little bags, most of them 10-pound bags, some 25. They run them through this washer and washed them, and that's the work that I done. They are out of the hands of the grower entirely. They are in the hands of the speculator. Not only that, but in the fall of the year they had a big warehouse that would hold probably 50,000 sacks in the basement, and they went out to the farmers and bought these potatoes and paid for them. They sorted them in the country and brought them in and stored them in the warehouse, and a lot of those potatoes stayed in that warehouse 'till spring, and we had to sort them again. Those potatoes was ready for market when they were sorted out here in the country. They were U. S. No. 1 and U. S. No. 2. Most of the 2's we didn't have to do too much to them because they didn't put them in the bags so much. (Supp. Tr. 113-114.) The way they buy potatoes here, they pay so much for these potatoes sorted U. S. No. 1 and No. 2, and the buyer pays for the sorting and the sacks and the transportation." (Supp. Tr. 116.)

Louise Franden testified: "We did hire crews to go out and sort potatoes in the cellar. They were sorted out there, and were loaded into cars when they came in. However, when we'd buy bulk potatoes, maybe we'd buy a cellar. We'd measure the cellar and say that we'd give them so much and they were brought into the warehouse and sorted there. (Supp Tr. 157.) These potatoes all belonged to the Miller Company when they were brought into the warehouse and the Miller

Company then hired people to sort them. If he wanted to sell them in the cellar so much for the whole cellar, we'd pay him for this amount, but if he wanted them sorted and graded by us, we would pay him afterwards. (Supp. Tr. 158-159.) They did store a lot of potatoes in the warehouse. (Supp. Tr. 161). The Miller Company paid for the sorting. We had a regular truck or two to use when the farmer didn't bring them in. (Supp. Tr. 162.) We did insist on having their social security number for purposes of income tax cross identification. (Supp. Tr. 164.)"

James Allen Fitts was employed by Albert Miller & Co. as warehouse manager at Burley, Idaho, for approximately four years and during the years of 1941 and 1942. His employment entailed buying, transporting, washing, sorting, storing, selling and shipping potatoes, and all other incidentals, including office management of the warehouse. He was authorized to purchase and sell potatoes. Approximately 60 per cent of the potatoes that were purchased were shipped to various points in the United States upon directions emanating from Albert Miller & Co. at Chicago, Illinois. Approximately 40 per cent of the potatoes purchased were sold *from the warehouse at Burley* by Fitts to local produce companies, local inter-state and intra-state transportation companies, stores, restaurants and private individuals, the price being left to the judgment of Fitts. (Supp. Tr. 83, 84, 85).

In his brief, on page 59, the appellant says, "The remaining forty percent of the potatoes were sorted and graded in the growers' cellars and were sold to local produce companies,

local interstate and intrastate transportation companies, restaurants, stores, and private individuals *without ever entering the warehouse.*"

This statement is contrary to the affidavits of Fitts, Anderson and Knight. Both Fitts and Anderson say they were sold from the warehouse at Burley, Idaho. (Supp. Tr. 84, 90.) Knight says, "That during the above mentioned months (November, December, 1941, January, February, March, April, May, September, October and November, 1942) during which he at various times purchased potatoes from the Albert Miller and Co. warehouse at Burley, Idaho, * * *."

Under the above testimony it cannot be successfully contended that the warehouse of Albert Miller & Co. was not a grower's market, the place where or the point of time at which the grower of the crop parted with economic interest in or control over its future form or destiny. It was a point from which the potatoes were sold to consumers, either in carload lots or smaller quantities, both in interstate and intrastate commerce. It was the point where the potatoes entered upon their commercial destiny. It was a "terminal market."

MILLER VS. BURGER SHOULD NOT BE OVERRULED.

The appellant asks this Court to overrule the case of Miller vs. Burger. Just what he would like to have the Court do with the decision in the case of Idaho Potato Growers vs. National Labor Relations Board, 144 Fed. (2nd) 295, is

not apparent. Just how the *Miller vs. Burger* case can be overruled without overruling the *Idaho Growers* case is not clear. Certainly the position of the appellant does not now conform with the position of the Board in that case. The change of designation from "Board" to "Administrator" should not justify such a change in position.

A reading of the opinions, both in the district and this court, discloses that the *Burger* case and the *Bettencourt* case received careful consideration by this Court. The decisions in both the *Miller vs. Burger* and *Miller vs. Bettencourt* cases are fundamentally sound and have been approved by other courts. In the case of *Producers Crop Imp. Ass'n vs. Dallman*, 178 Fed. (2nd) 66, that court approved the ruling of the *Burger* case, under the facts in the *Burger* case, but held the facts in its case did not bring it within the rule of the *Burger* case. The Court of Appeals of the Seventh Circuit said, "We agree with that Court that under the admitted facts in this case, *Rosenberg Bros.*' plant was a terminal market for the farmer producers, who sold and delivered their dried fruits to that concern; that it was 'the market' of such farmer producers, or to state it in another way, 'the growers market,' since this commercial plant was the place where the farmer producer of dried fruit customarily parted with all of his economic interest in the fruit, its future form or destiny. The facts make abundantly clear that it was only after the farmer producer sold and delivered the fruit to *Rosenberg Bros.* that *Burger's* services (described in the opinion of the district court) were performed for that commercial concern".

The question received consideration by the Court of Appeals in the Fifth Circuit in the case of *Chester C. Fosgate Co. vs. United States*, 125 Fed. (2nd) 778, wherein the Court said: "Services in gathering crops and transporting them to market would ordinarily be in connection with harvesting and agricultural, because usually performed by or for the person who produces them. But touching crops that have to be processed before marketing, in recent years businesses have arisen that are more nearly mercantile and manufacturing than agricultural. Such businesses have increasingly tended to buy crops in the field or on the trees, thus cutting short the agricultural operations and transferring the harvest to the new business field. This is the rule in the citrus fruit business. This record states that Fosgate Company buys no fruit which it does not itself gather. The Regulation, Art. 206 (b), seeks to deal with such situations, and to declare that persons employed not by the producer of crops, but by a processor who has bought them after maturity, is rendering services 'in connection with processing,' rather than in connection with the cultivation of the soil, and his labor is not fairly agricultural. It does not mention expressly 'gathering,' but where the processing purchaser prefers to buy on the trees and do the gathering for himself, perhaps thinking he can do it better, and know the fruit is not bruised or scratched, we think it reasonable to hold, as the district court did, that the labor actually done in such gathering is closer to the mercantile enterprise of processing and marketing than it is to agriculture."

INSTANT CASE IS NOT DISTINGUISHABLE FROM MILLER VS. BURGER.

If the instant case were distinguishable from the Burger case, it is not apparent why the appellant is so insistent that the Burger case should be overruled. If this case is distinguishable from the Burger case, then a reversal of the judgment of the lower court would not overrule the Burger case but the two decisions would be distinguishable and would stand together. If the appellant were sincere in his contention that this case is distinguishable from the Burger case, then why all of the waste of time and space in his discussion of the Burger case? The fact is the case is not distinguishable from the Burger case, but is clearly controlled by the rule announced in the Burger case, and the decision of the lower court cannot be reversed without overruling the Burger case.

An attempt is made to distinguish the instant case on the theory that Idaho adopted the Uniform Sales Act in 1919. Section 64-203 of the Idaho Code in part provides:

"Time when property passes to buyer—Rules for ascertaining intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." * * *

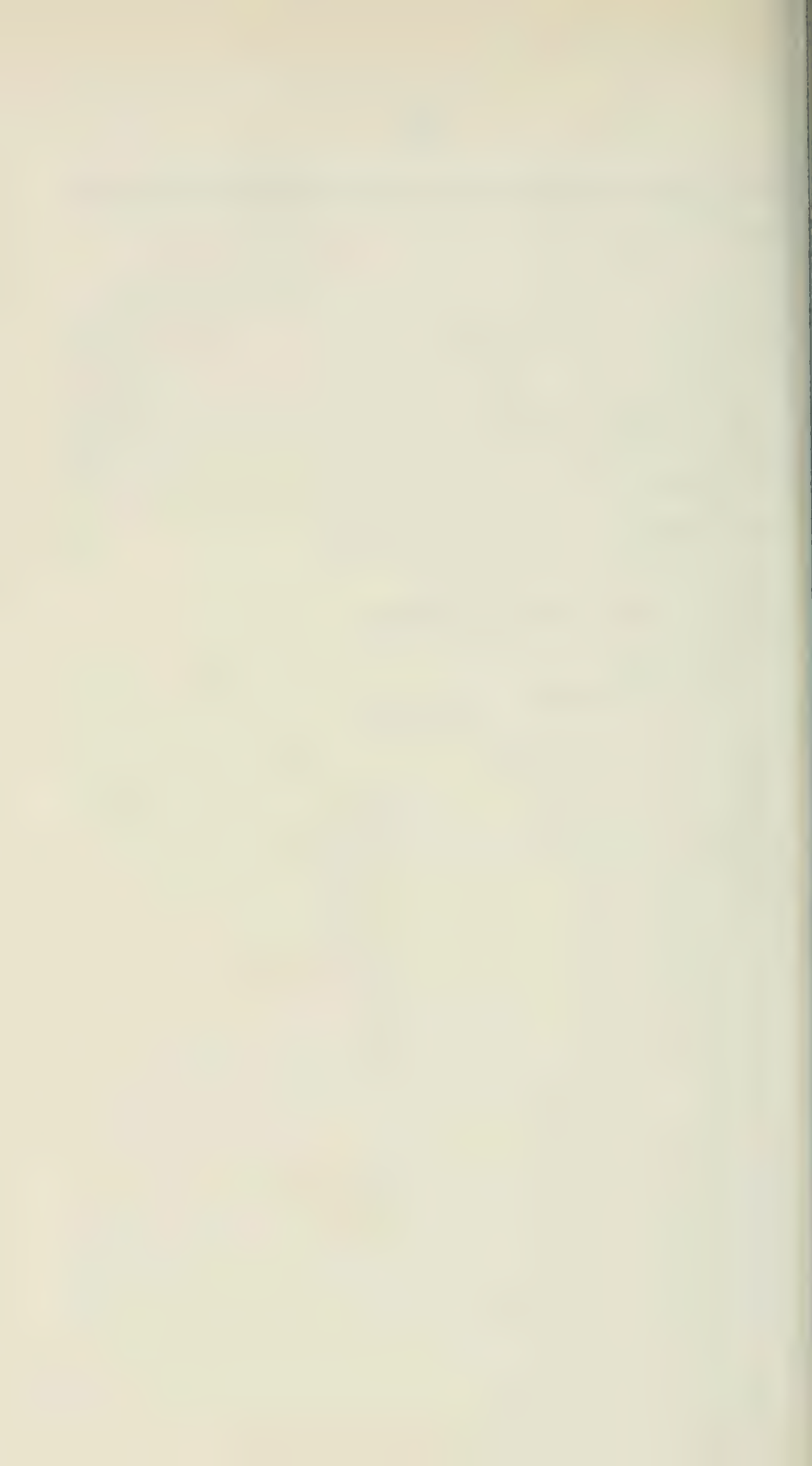
In the case of *Johnson vs. Besoyan*, (Cal.) 193 Pac. (2nd) 63, it is said:

"Section 1739 of the same code (Civil Code) contains the following:

'Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

'Rule 1. (Goods in deliverable state.) Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed'."

The instant case is not distinguishable from the *Burger* case, the ruling in the *Burger* case is controlling in this case and a reversal of the judgment of the lower court in this case would be tantamount to overruling the *Burger* case.



No. 12524

United States
Court of Appeals
For the Ninth Circuit.

S. V. JUBAS, Doing Business Under the Fictitious
Firm Name and Style of WEST COAST JOB-
BING COMPANY,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for
the Estate of FASHION BOOTERY, a Co-
partnership Composed of GENE FAGAN and
LEO G. OLSON, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED
JUL 10 1950

PAUL P. O'BRIEN, CLERK

No. 12524

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S. V. JUBAS, Doing Business Under the Fictitious
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GENDEL & RASKOFF,

810 James Oviatt Bldg.,

617 S. Olive St.,

Los Angeles 14, Calif.

For Appellee:

CRAIG, WELLER & LAUGHARN,

817, 111 West 7th St.,

Los Angeles 14, Calif.

In the District Court of the United States, Southern
District of California, Central Division

Civil No. 10392-W

PAUL W. SAMPSELL, Trustee in Bankruptcy for
the Estate of FASHION BOOTERY, a Co-
partnership Composed of GENE FAGAN and
LEO G. OLSON, Bankrupt,

Plaintiff,

vs.

S. V. JUBAS, Doing Business Under the Fictitious
Firm Name and Style of WEST COAST
JOBGING COMPANY,

Defendant.

COMPLAINT

(Fraudulent Conveyances, Bankruptcy Act, Section
70-E, Civil Code of California, Section 3440)

Plaintiff for his cause of action complains of the
defendant and alleges:

I.

That at all times herein mentioned, the bankrupt,
Fashion Bootery, was a copartnership composed of
Gene Fagan and Leo G. Olson, and was engaged in
the sale of shoes at retail in the County of Los
Angeles, in the Southern District of California.

II.

That at all times herein mentioned, the defendant
S. V. Jubas was a sole trader doing business under

the fictitious firm name and style of West Coast Jobbing Company, at No. 721 South Los [2*] Angeles Street, Los Angeles, California.

III.

That on March 1, 1949, an involuntary petition in bankruptcy was filed in the District Court of the United States, Southern District of California, Central Division, by three creditors of the bankrupt, Fashion Bootery, a copartnership, as aforesaid, praying that it be adjudged a bankrupt within the provisions of Section 4, subdivision b, and Section 5, subdivision a, of the National Bankruptcy Act; that thereafter such proceedings were had that on March 23, 1949, an adjudication in bankruptcy was entered against said bankrupt copartnership by said United States District Court, and at the first meeting of creditors had and held before Honorable Benno M. Brink, Referee in Bankruptcy, before said Court to whom said proceedings had been referred, the plaintiff was elected trustee in bankruptcy, filed his bond and qualified, and at all times since May 5, 1949, has been and now is the duly elected, qualified and acting Trustee in bankruptcy for the bankrupt estate of said Fashion Bootery, a copartnership, as aforesaid.

IV.

That this is an action brought under the provisions of Section 70-e of the National Bankruptcy Act, and Section 3440 of the Civil Code of California

* Page numbering appearing at bottom of page of original Transcript of Record.

to set aside and avoid transfers made by the bankrupt in fraud of its creditors, and to recover the value of the property so transferred by said bankrupt for the benefit of the bankrupt estate.

V.

Plaintiff alleges that on or before the 11th day of August, 1948, the bankrupt copartnership was engaged in the business of selling shoes to the public at retail and was a retail merchant; that on August 11, 1948, while so engaged in the business of selling shoes to the public at retail, the bankrupt copartnership sold, transferred and delivered to the defendant a shipment consisting of [3] 1,240 pairs of shoes which had cost the bankrupt copartnership from \$5.25 to \$8.25 per pair, or a total value of approximately \$7800.00, for a sale price of \$1.00 per pair; that said 1,240 pairs of shoes constituted a substantial part of the bankrupt copartnership's stock in trade, and that the sale and transfer of said shoes was not accomplished in the usual and ordinary course of the business of the bankrupt, namely, sale of shoes at retail to the public, but was made for the purpose of resale by the said defendant herein.

VI.

That neither the bankrupt nor the defendant herein at least 7 days prior to the consummation of such sale and transfer of said 1,240 pairs of shoes to the defendant, recorded in the office of the County Recorder of the County of Los Angeles, in which

said shoes were situated, a notice of said intended sale or transfer of said shoes, stating the name and address of the intended vendor or transferor, and the name and address of the intended vendee or transferee, and a general statemnt of the character of the merchandise intended to be sold or transferred, and the date when and the place where the purchase price or consideration was to be paid, nor did the bankrupt nor the defendant publish a copy of such notice in a newspaper of general circulation published in the township in which such transfer was intended to be made; that at the time of said transfer of said 1,240 pairs of shoes, the bankrupt copartnership was indebted to numerous and divers creditors whose claims remained unpaid in the bankruptcy proceedings hereinbefore described, and in so far as said creditors are concerned and in so far as the plaintiff herein is concerned, said sale was fraudulent, null and void.

VII.

That the plaintiff is informed that the defendant has sold and disposed of said shoes and that the same cannot be returned. [4]

Wherefore, plaintiff prays judgment against the defendant for the value of said shoes, namely, the sum of \$7,800.00, with interest on said sum from May 4, 1949, at the rate of 7% per annum, together with all of the plaintiff's costs and disbursements herein; and that plaintiff be given such other and

further relief as the Court may deem just and equitable in the premises.

CRAIG, WELLER &
LAUGHARN,

By /s/ FRANK C. WELLER,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed Sept. 29, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and by way of answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

First Defense

I.

Admits the allegations of Paragraphs I, II and III.

II.

Denies generally and specifically each and every allegation contained in Paragraph IV. [7]

III.

By way of answer to Paragraph V, defendant admits that the bankrupt copartnership therein referred to, was engaged in the business of selling

shoes to the public at retail and that defendant on or about August 11, 1948, purchased 1240 pairs of shoes from said bankrupt copartnership for the sum of \$1240.00, but except as in this Paragraph otherwise expressly admitted, defendant denies generally and specifically each and every allegation contained in Paragraph V.

IV.

By way of answer to Paragraph VI, this answering defendant admits that no notice of an intended sale was either published or recorded. In answer to the portion of said Paragraph VI beginning at Line 23 of Page 3 of the complaint with the words "that at the time of said transfer. . . .," and ending at the end of said Paragraph VI, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this portion of Paragraph VI, and for this reason denies generally and specifically each and every allegation therein contained.

Second Defense

I.

That the sale of 1240 pairs of shoes by the afore-said bankrupt copartnership to the defendant on or about August 11, 1948, was in the ordinary course of trade and in the regular and usual practice and method of business of the said bankrupt copartnership.

Third Defense

I.

That the sale of 1240 pairs of shoes by the afore-said [8] bankrupt copartnership to the defendant on or about August 11, 1948, did not constitute a substantial part of the stock in trade of the said bankrupt copartnership. In this connection, defendant alleges that said 1240 pairs of shoes purchased by defendant from the said bankrupt copartnership, constituted approximately one-fourth of the stock in trade of the bankrupt at the time of said sale, on the basis of the number of pairs of shoes then owned by the bankrupt, but said 1240 pairs of shoes constituted less than 10% of the then market value of the stock in trade of the bankrupt copartnership at that time.

Fourth Defense

I.

That the provisions of Section 3440 of the Civil Code of the State of California did not apply to the transaction between the bankrupt copartnership and the plaintiff.

Fifth Defense

I.

That defendant is not indebted to plaintiff in any sum whatsoever.

Sixth Defense

I.

The complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, defendant prays that the complaint be dismissed; for defendant's costs of suit incurred herein; and for such other and further relief as to the Court may seem proper.

GENDEL & RASKOFF.

By /s/ H. MILES RASKOFF,
Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 25, 1949. [9]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The pre-trial conference in the above-entitled cause having regularly come on for hearing before the undersigned on December 9th, 1949, the plaintiff appearing by Thomas S. Tobin, Esq., of Craig, Weller & Laugharn, his attorneys, and the defendant S. V. Jubas appearing by Martin Gendel, Esq., of Gandel & Raskoff, his attorneys, and the said parties through their respective counsel having entered into the following stipulation of facts:

Several years prior to the transaction herein involved, A. Needleman, Gene Fagan and Leo G. Olson were co-partners doing business as Fashion Bootery; at or about January, 1948, the partnership was dissolved by the withdrawal of A. Needleman, and the [11] present bankrupt Fashion Bootery, a copartnership composed of Gene Fagan and Leo G. Olson was formed to carry on its business of selling shoes, particularly women's shoes, at 520 South Hill Street, Los Angeles, California.

At or about August, 1948, the bankrupt decided to sell approximately 1240 pairs of shoes which it had accumulated during its existence and which were rendered obsolete by reason of broken sizes, changes in styles, obsolete novelty styles, and a change from high heel shoes to low heel shoes.

As of the date of the sale involved in the instant case, the bankrupt contends it was solvent.

Prior to August 11, 1948, the only substantial sale of a like character as is involved in the instant case was the sale in a job lot of accumulated rubber rain shoes.

On August 11, 1948, the defendant bought the 1240 pairs of shoes, issuing a check for \$1,000 on that date and leaving a balance of \$240 to be paid when the shoes were delivered to and checked by the defendant; the balance of \$240 was paid by check dated August 17, 1948. The \$1240 was used by the bankrupt in the ordinary course of business.

No notice of intention to sell was recorded, filed or published by the bankrupt, or the defendant, in

connection with the above-described sale. There was immediate delivery of the pairs of shoes by the plaintiff to the defendant and an actual and continued change of possession.

The defendant offers, in support of his position, the testimony of the two partners of the partnership, and numerous retail and wholesale shoe merchants in the City of Los Angeles, including the following:

Ira L. Brown of Dr. A. Reed Arch Shoe Company;

Mike Kaplan of the C. H. Baker Corporation;
P. M. Siegel of Innes Shoe Company; [12]

A. Scharlin of Solnit Shoe Company;

Jack Orlikoff of Pacific Coast Shoe Company;

Ben S. Rappaport;

R. Laskey of Brasley-Cole Shoe Company;

Oscar Maier of Foster's Shoe Stores, Inc.;

Mark Warner of College Boot Shop.

The plaintiff concedes that the witnesses named by the defendant all would be produced to testify as to custom; if produced, would testify, if permitted, that frequently retail merchants of shoes disposed of surplus or obsolete and shop-worn stock in the manner that these 1240 pairs of shoes were disposed of.

In connection with the witnesses herein named, original statements from each of the same have been designated as Defendant's Exhibit "A" for identification and deposited with the Court, photostatic copies thereof having been furnished to the coun-

sel for the plaintiff; it was further stipulated that if the said evidence is deemed material, that then the Court shall consider the contents of the said defendant's Exhibit "A," for identification, as if the persons signing the said statements had testified under oath as witnesses in the court proceedings.

Subject to plaintiff's objection as to the materiality of such evidence, it was stipulated that prior to the sale to defendant, the bankrupt had made all available attempts to sell said shoes in the ordinary retail method of separate pairs of shoes to individual customers and had been unsuccessful, and the bankrupt had been unable to obtain any higher or better offer than the sum of \$1.00 per pair offered by the defendant herein.

It was further stipulated that the issues of fact to be determined by the Court are as follows:

1. Are there still unpaid creditors who have filed proofs of claims in the bankruptcy proceedings involved who were unpaid creditors between August 11, 1948, and August 17, 1948? [13]

2. What was the value of the 1240 pairs of shoes on August 11, 1948?

3. What were the total number of pairs of shoes owned by the bankrupt on August 11, 1948?

4. What profit, if any, did the defendant make upon the re-sale of the 1240 pairs of shoes?

5. Was there, on or about August 11, 1948, a custom and usage in the retail shoe business whereby retail shoe merchants disposed of surplus, obsolete

and shop-worn stock of the character involved in the instant case by job lot sales, without compliance with Section 3440 of the Civil Code?

(a) If this custom and usage is found to have existed, was it a part of the regular and usual practice and method of business of the bankrupt herein?

6. Did the sale of the 1240 pairs of shoes constitute the sale of a substantial part of the stock in trade of the bankrupt?

7. It was further stipulated that the legal question to be determined by the Court, upon the basis of the facts as stipulated hereinabove and the facts to be found, is whether or not the sale to the defendant was excepted from the application of Section 3440 of the California Civil Code; if found excepted, this would terminate the case in favor of the defendant; if found in favor of the plaintiff, then the remaining legal issue would be to determine the amount of damages.

Each of the parties hereto having submitted memoranda of points and authorities in support of their position and statements of facts, and after hearing the arguments of counsel, and accepting the above stipulations, and being fully informed in the premises, and good cause appearing therefore, [14]

It Is Hereby Ordered:

I.

That the above stipulation of facts is accepted and

approved and said facts shall be deemed established in this case, and the Court hereby finds said facts to be true; there shall be no issue with respect thereto at the trial of this action.

II.

The issues for trial shall be limited to the questions of fact left at issue, as recited hereinabove, and to the determination of the issues of law as described hereinabove, particularly with reference to the application of Section 3440 of the California Civil Code.

Dated this 12th day of December, 1949.

/s/ JAMES M. CARTER,
United States District Judge.

Approved:

CRAIG, WELLER &
LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Paul W. Samp-
sell, as Trustee, Plaintiff.

GENDEL & RASKOFF,

By /s/ MARTIN GENDEL,
Attorneys for Defendant,
S. V. Jubas.

[Endorsed]: Filed Dec. 13, 1949. [15]

DEFENDANT'S EXHIBIT "A"

[Letterhead]

Innes Shoe Co.

Seventh Street at Olive, Los Angeles 14

October 11, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Building
617 South Olive Street
Los Angeles 14, California

Dear Sir:

We understand you are representing Mr. S. V. Jubas doing business as the West Coast Jobbing Company in a certain litigation and are interested in the method that is used by us as retailers in the shoe business.

We have been in business almost fifty years and have found it absolutely necessary at the end of each season to dispose of all merchandise we don't want to carry over to next season because they more or less become obsolete. We think it is good business to do so. I have always believed the first loss is the sweetest.

If you would like to know how we have disposed of our shoes—we as a rule sell them to someone out of town who probably is in the cancellation business; as an example, we sell all of our shoes to Irving Snide in Oakland. We sell them to him once or twice a year, he pays for them, he sells them, and it is a very happy deal for all concerned.

Defendant's Exhibit "A"—(Continued)

When we make a sale such as the above we don't go through any escrow or any written notices to creditors. We do it as part of the routine business and we find this the best method. Otherwise our stocks would keep mounting and mounting and we would accumulate a lot of frozen assets.

We hope the above information will enlighten you as to [16] the method we have of disposing of our short and broken lines and should you need any further information we shall be glad to furnish same.

Very truly yours,

INNES SHOE CO.,

/s/ P. M. SEIGEL.

S/T. [17]

[Letterhead]

College Boot Shop

516 So. Hill St.

Los Angeles, Calif.

Oct. 18, 1949.

H. Miles Raskoff, Esq.,
Kendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive St.,
Los Angeles 14, Calif.

Dear Sir:

We understand you are legal attorneys for Mr. S. V. Jubas doing business as the West Coast Jobbing Co.

Defendant's Exhibit "A"—(Continued)

I understand you are interested in the method used by us as retailers in the shoe business.

I have been in the retail shoe business for approximately fifteen years. At the end of each season, spring and fall, after retailing our shoes to the public, there is always left over a considerable number of pairs of odds and ends. It has always been my method to call in a job lot buyer and dispose of these shoes at the best price obtainable. This method has been used by me particularly for women's novelty footwear because of the rapid change in styles. I have found that by calling in a job lot buyer I can always dispose of my unseasonable merchandise so that I do not accumulate a stock of odds and ends which makes my merchandising problem an almost impossible one. I know that practically all shoe retailers, and especially retailers of women's novelty footwear follow the method that I have outlined above.

The above-described sales of job lots, etc., are made without any escrow and without any notice to creditors.

I hope the information that I have furnished you will enlighten you as to the way I dispose of broken lines of shoes.

Should you need any additional information, I will be glad to furnish same.

Yours very truly,

COLLEGE BOOT SHOP,

/s/ MARK WARNER. [18]

Defendant's Exhibit "A"—(Continued)

[Letterhead]

Foster's Shoe Stores, Inc.

440-442 So. Broadway, Los Angeles 13, Calif.

Oct. 18, 1949.

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 S. Olive St.,
Los Angeles 14, Calif.

Dear Sir:

Please be advised that in the early part of August, 1948, I was called in by one of the proprietors of the Fashion Bootery regarding a close out of ladies' shoes. I cannot recall at this time the exact amount of shoes, but I believe it was somewhere in the neighborhood of 1,000 to 1,200 pairs and the price they asked for the lot was \$1.25 per pair. I turned them down at this price as I did not think they were worth it.

I believe I had recommended to either Mr. Fagen or Mr. Olsen of the Fashion Bootery that they contact Mr. Si Jubas of the West Coast Jobbing Co., regarding purchasing this lot of shoes and subsequently the sale was made to Mr. Jubas.

Yours very truly,

FOSTER'S SHOE STORES,
INC.,

/s/ OSCAR MAIER,

OM-b. [19]

Pres.

Defendant's Exhibit "A"—(Continued)

[Letterhead]

Foster's Shoe Stores, Inc.

440-442 So. Broadway, Los Angeles 13, Calif.

Oct. 17, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive St.,
Los Angeles 14, Calif.

Dear sir:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Co., in a certain litigation and are interested in the method we use in disposing of our short and broken lines and discontinued styles at the end of the Seasons.

For your information we have been in the shoe business in Kansas City for approximately 25 years and in Los Angeles 5 years and we have found that it is absolutely necessary at the end of the Summer and Fall seasons to run retail sales to try to dispose of the discontinued styles and short and broken lots of shoes that we do not intend to replenish. We would reduce our prices anywhere from 33 and $\frac{1}{3}\%$ to 50%. After the sale, the balance then remaining, we would call in the job lot buyers and get the very best price we possibly could for these odds and ends. The quantity sold to the job lot buyers would vary according to what would be left

Defendant's Exhibit "A"—(Continued)

over at the end of the seasons. If we had a bad season, we would have a larger quantity of shoes to close out and if we had a good season, we would have a smaller quantity to close out. Nevertheless, there always would be shoes to close out and the reason is obvious, because styles continuously change, and changing as rapidly as they do, if we did not use this method we would have a tremendous accumulation of shoes that would be absolutely worthless. Whenever we did dispose of the shoes as described above, we did not go thru Escrow nor did we deem it necessary to notify our creditors to this effect.

It is a known fact in the retail shoe business that there is not a store in the country who does not have any close-outs. Some stores may want to hold on to their shoes a little longer while others will close out immediately after the seasonal sales are over.

Trusting the above information will enlighten you as to the method we use in disposing of our close-outs,

Yours very truly,

FOSTER'S SHOE STORES,
INC.

/s/ OSCAR MAIER,
President. [20]

Defendant's Exhibit "A"—(Continued)

[Letterhead]

Brasley-Cole Shoe Co., Ltd.
1114-1118 South Los Angeles Street
Los Angeles 15, California

October 13, 1949

Mr. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive St.,
Los Angeles 14, California.

Gentlemen:

We have been informed that you represent Mr. S. V. Jubas, doing business as West Coast Jobbing Company, in some type of litigation and are interested in receiving an opinion as to general business practice in disposing of odd lot shoes in our particular industry.

It has been and still is the practice in the retail shoe industry to dispose of broken and odd lots, especially so in the high styled field at the close of each season or any particular fiscal period at greatly reduced prices, to job lot buyers or anyone else interested in buying odds and ends at almost ridiculously low prices. These broken lot sales, to the writer's knowledge, are made without any escrow agreements and without written notice to creditors. The writer has been in the shoe business in all its ramifications for upwards of 30 years and this has

Defendant's Exhibit "A"—(Continued)
been the accepted practice of good merchandising not only with retail independents, or chain operations, but also with manufacturers.

If we can be of any service in explaining further, please do not hesitate to communicate with us.

Very truly yours,

BRASLEY-COLE SHOE
CO., LTD.

By /s/ R. LASKY,
General Manager.

L:s [21]

[Letterhead]

Ben S. Rapport

212 East Ninth Street, Los Angeles 15, Calif.

October 12, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
617 So. Olive St. (810 James Oviatt Bldg.)
Los Angeles 14, Calif.

Dear Sir:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Company, in a certain litigation and are interested in knowing something about the method used by retailers in disposing of their surplus and odds and ends.

Defendant's Exhibit "A"—(Continued)

The writer has been in the shoe business for a period of 28 years, having been a department store buyer for 22 years of that time and it has always been customary and still is for that matter to run seasonable sales on merchandise directed for disposal at reduced prices and when this sale is over the shoes are grouped together with additional mark-downs kept to a minimum and sold off to jobbers in the trade who will give the nearest price without additional loss to the last mark-down taken, of course considering that no selling cost is attached. This is the universal and accepted method used by retailers in disposing of broken lines and odds and ends especially women's novelty shoes so that room can be made for the new season's goods that are about to arrive and need the space in the wall.

Unless a method like this were practiced you can understand how retailers, from the nature of the shoe business involving the pairage of sizes would readily become cluttered up with a stock that would be obsolete and hamper the successful operation on style shoes.

This same procedure is used by wholesalers and manufacturers who carry stock shoes and must dispose of seasonable merchandise at the end of each season.

Most department stores today demand that their buyers dispose of any and all merchandise which has become one year old and that goes not only for novelty but for staple lines.

Defendant's Exhibit "A"—(Continued)

Trust that the above information will be of some assistance to you in the case confronting you, I am,

Yours very truly,

/s/ BEN S. RAPPORT.

BSR:ML [22]

[Letterhead]

Pacific Coast Shoe Co.

768-70 So. Los Angeles Street, Los Angeles 14, Calif.

October 12, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 S. Olive Street,
Los Angeles 14, Calif.

Dear Sir:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Company, in a certain litigation, and are interested in the method that is used by us as wholesalers in the shoe business.

It has always been the practice of retailers, large or small, to close out job lots in shoes if they are out of sizes in particular runs, slow moving, or out of season due to colors, sizes or types. One of the main reasons why the retailer, after he has run his retail sales, wants to dispose of the above-described shoes, is because in fashion and novelty shoes the

Defendant's Exhibit "A"—(Continued)

styles change so rapidly and become obsolete very quickly. Therefore, the retailer must dispose of these types of shoes as quickly as possible.

It has been my experience, both in the wholesale and retail, buying of job lots are made without any escrow and without any written notice to creditors, as this is done in the usual course of business.

Trusting this information will enlighten you as to the method that the retailers have in disposing of short and broken lines of shoes.

Very truly yours,

PACIFIC COAST SHOE
COMPANY,

/s/ JACK ORLIKOFF.

JO/sbl [23]

[Letterhead]

Solnit Shoe Co.

817-821 S. Los Angeles Street

Los Angeles 14, California

October 12, 1949

Mr. H. Miles Raskoff,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive St.,
Los Angeles 14, Calif.

Dear Mr. Raskoff:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Job-

Defendant's Exhibit "A"—(Continued)
bing Company, in a certain litigation and are interested in the method that is used by us in the shoe business.

Regarding the matter of purchasing close-outs from retail stores, after having observed the practices of retailers during the past 25 years, outside of the disposal of complete departments, I have no recollection that retailers ever publish notices of intention to sell only portions of their stocks. Notice of intention to sell is used when stores are sold to new owners.

I know that retailers continuously clean out their stocks to stock buyers and other retailers when they find that they are over-stocked or that certain shoes are not moving, whether a few pairs are involved or whether large lots are involved.

Sincerely yours,

/s/ A. SCHARLIN.

AS:DA [24]

Defendant's Exhibit "A"—(Continued)

[Letterhead]

Dr. A. Reed Arch Shoe Company
622-624 So. Hill Street
Los Angeles 14, California

October 11, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive Street,
Los Angeles 14, Calif.

Dear Sir:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Co., in a certain litigation and are interested in the method that is used by us as retailers in the shoe business.

We have been in this business for 34 years and have found that after the season is over, we run a retail sale and dispose of as much of the shoes as we can and in order to dispose of the balance still remaining in order to make room for the new season's merchandise coming in, we call in the job lot buyers and dispose of it to them at the best price we can obtain for the close outs and broken lots.

This procedure has been practiced by us for many years and we have found it to be the best method to clean out our stock, particularly ladies' novelty

Defendant's Exhibit "A"—(Continued)
shoes and ladies' shoes in general. We stress the point of the novelty shoes for the reason that they change in style more so than the arch type shoes. Had we not followed the above practice in disposing of our odds and ends and broken and unseasonable shoes, in a few years, our stock would become obsolete and would hamper our successful method in merchandising of our high style shoes. We know it to be a fact that all successful shoe retailers follow the above procedure.

The above-described sales of job lots, etc., are made without any escrow and without any written notice to creditors.

We hope the above information will enlighten you as to the method we have in disposing of our short and broken lines and should you need any further information, we shall be glad to furnish same.

Yours very truly,

/s/ IRA L. BROWN. [25]

Defendant's Exhibit "A"—(Continued)
[Letterhead]

The C. H. Baker Corporation
730 South Los Angeles Street, Los Angeles 14

October 11, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 South Olive Street,
Los Angeles 14, Calif.

Dear Sir:

We understand you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Co., in a certain litigation and are interested in the method that is used by us as retailers in the shoe business.

We have been in the retail shoe business for 50 years. When each season is over, we have a sale and dispose of distress and broken lines of shoes. At the end of the sale, in order to dispose of the balance and make room for new season's merchandise, it has been our practice to call in various job lot buyers and dispose of the residue at the best price obtainable.

This procedure has been in practice by us for many years and we have found it to be the best method of cleaning our stock, particularly novelty shoes. We stress the point of novelty shoes because with the rapid changes that occur in styling

Defendant's Exhibit "A"—(Continued)
and colors, it is necessary to dispose of these odds and ends in as short a time as possible. In the event that this disposition was not made, our stocks would soon become burdened down with obsolete merchandise and would be a great hinderance to successful merchandising.

We are certain that the above procedure of handling odds and ends, obsolete styles and broken lines is a common practice among the best shoe retail operations in America.

Very truly yours,

THE C. H. BAKER
CORPORATION,

/s/ MIKE KAPLAN.

MK:meg [26]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action coming on for trial December 14, 1949, at 10 a.m., and the plaintiff appearing by his attorneys, Messrs. Craig, Weller & Laugharn and Thomas S. Tobin of counsel, and the defendant appearing in person and by Martin Gendel, Esq., of Gendel & Raskoff, his attorneys, and the matter having been continued from time to time until December 21, 1949, at 10:30 a.m. with

the same appearances, and testimony having been taken and evidence having been received and with stipulations having been entered into by counsel for the plaintiff and defendant at the pre-trial conference hereafter held, and said matter having been concluded and submitted and the Court having announced his decision in favor [27] of the plaintiff, now makes and enters the following Findings of Fact:

I.

Several years prior to the transaction herein involved, A. Needleman, Gene Fagan and Leo G. Olson were copartners doing business as Fashion Bootery; at or about January, 1948, the partnership was dissolved by the withdrawal of A. Needleman, and the present bankrupt Fashion Bootery, a copartnership composed of Gene Fagan and Leo G. Olson was formed to carry on its business of selling shoes at retail, particularly women's shoes, at 520 South Hill Street, Los Angeles, California. On or before August 11, 1948, the bankrupt copartnership was engaged in the business of selling shoes to the public at retail, and was a retail merchant.

II.

The defendant S. V. Jubas was, at all times herein mentioned, a sole trader doing business under the fictitious firm name and style of West Coast Jobbing Company, at 721 South Los Angeles Street, Los Angeles, California.

III.

On March 1, 1949, an involuntary petition in bankruptcy was filed in the District Court of the United States Southern District of California, Central Division, by creditors of the Bankrupt, Fashion Bootery, a copartnership, praying that it be adjudicated a bankrupt within the provisions of Section 4, Subdivision B, and Section 5, Subdivision A, of the National Bankruptcy Act; that on March 23, 1949, an Order of Adjudication was entered against the bankrupt copartnership by the United States District Court for the Southern District of California, and that at the first meeting of creditors, held before Referee Benno M. Brink, to whom the proceedings had been referred, plaintiff herein was elected Trustee in Bankruptcy, filed his bond, and qualified, and at all times since May 5, 1949, has been, and now is, duly elected, qualified, and [28] acting Trustee in Bankruptcy for the bankrupt estate of Fashion Bootery, a copartnership.

IV.

At or about August, 1948, while so engaged in the business of selling shoes to the public at retail, the bankrupt decided to sell approximately 1240 pairs of shoes which it had accumulated during its existence and which were rendered obsolete by reason of broken sizes, changes in styles, obsolete novelty styles, and a change from high heel shoes to low heel shoes; the said 1240 pairs of shoes had originally cost the bankrupt copartnership from \$5.25 to \$8.25 per pair. Prior to that date the

bankrupt had made all available attempts to sell said shoes in the ordinary retail method of separate pairs of shoes to individual customers, and had been unsuccessful. The bankrupt had been unable to obtain any higher or better offer for said shoes than \$1 per pair, which was offered by the defendant herein.

V.

On August 11, 1948, the bankrupt was solvent, and on said date the defendant bought the aforementioned 1240 pairs of shoes from the bankrupt, issuing a check for \$1000 on that date, and leaving a balance of \$240 to be paid when the shoes were delivered to and checked by the defendant. The said shoes were delivered to and checked by the defendant, who paid the balance of \$240 to the bankrupt on August 17, 1948. The said sum of \$1240 paid by the defendant to the bankrupt was used by the bankrupt in the ordinary course of the business of the bankrupt.

VI.

No notice of intention to sell was recorded, filed or published by the bankrupt, or the defendant, in connection with the above-described sale. There was immediate delivery of the said 1240 pairs of shoes by the bankrupt to the defendant, and thereafter was an actual and continuous change of possession. [29]

VII.

The Court finds that a custom had arisen and been followed in Los Angeles County, California,

whereby retailers or shoes ignoring Section 3440 of the Civil Code of California the bulk sales law, made it a practice to sell surplus and obsolete merchandise to jobbers without recording any notice in the office of the County Recorder of the State of California or publishing said notice as required under the bulk sales law, and that this custom of ignoring the provisions of Section 3440 was followed in this instance by the bankrupt and the defendant herein, without any dishonest intent on their part.

VIII.

The aforementioned 1240 pairs of shoes sold by the bankrupt to the defendant, constituted at the time of the sale 25% of the number of pairs of shoes then held as the stock in trade of the bankrupt and 15% of the value of the then stock in trade of the bankrupt.

IX.

The parties to said transaction, namely, bankrupt and defendant, could have, without difficulty, recorded and published the required notice under Section 3440 of the Civil Code of the State of California.

X.

At the time of said sale and transfer of said 1240 pairs of shoes, the bankrupt copartnership was indebted to at least two creditors whose claims have not been paid, and who are creditors in the bankruptcy proceedings of the bankrupt copartnership, namely, Elsie Bleich, a creditor in the sum of \$2,200, and Elmer Sikorski, a creditor in the sum of \$250.

Based upon the foregoing findings of fact, the Court makes the following Conclusions of Law: [30]

I.

The Court has jurisdiction of the subject matter of this action and of the persons of the plaintiff and defendant under the provisions of Section 70-E of the National Bankruptcy Act, to void said transfer and to render judgment against the transferee, defendant herein, for the value of the merchandise so transferred.

II.

The 1240 pairs of shoes sold by the bankrupt copartnership to the defendant constituted a substantial part of the bankrupt copartnership's stock in trade, both from the viewpoint of quantity and the value of said stock in trade at the time of said sale.

III.

By reason of the failure to record and publish a notice of intended sale, notwithstanding the custom originated and followed by the shoe retailers not to so record and publish, the said sale was and is null and void as to existing creditors of the bankrupt at the time of the transfer, and as to the bankrupt's trustee in bankruptcy, under Section 3440 of the Civil Code of the State of California, and Section 70-E of the National Bankruptcy Act.

IV.

Notwithstanding the fact other retailers and jobbers may have violated the provisions of Section

3440 in the past, such custom merely shows a custom to ignore the plain provisions of the law of the State of California, and does not constitute the ordinary course of trade or the usual course of business such as was engaged in by the bankrupt.

V.

Plaintiff is entitled to judgment against defendant for the value of said shoes, which value the Court fixes in the sum of \$1 per pair, or \$1240.00.

Let judgment be entered accordingly, without interest, to date of entry of judgment, with costs, to the plaintiff.

Dated this 10th day of Feb., 1950.

/s/ JAMES M. CARTER,
U. S. District Judge.

Approved as to Form Under Local District Rule.

GENDEL & RASKOFF,

By /s/ MARTIN GENDEL,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 10, 1950. [32]

In the District Court of the United States, Southern District of California, Central Division

Civil No. 10392-C

PAUL W. SAMPSELL, Trustee in Bankruptcy
for the Estate of FASHION BOOTERY, a
Copartnership Composed of GENE FAGAN
and LEO G. OLSON, Bankrupt,
Plaintiff,

vs.

S. V. JUBAS, Doing Business Under the Fictitious
Firm Name and Style of WEST COAST JOB-
BING COMPANY,
Defendant.

JUDGMENT AND DECREE FOR PLAINTIFF

The above-entitled matter finally coming on for hearing on December 21, 1949, at 10:30 a.m., plaintiff appearing by his attorneys, Messrs. Craig, Weller & Laugharn and Thomas S. Tobin, and defendant appearing in person and by his attorney, Martin Gendel, and testimony having been taken and the Court having made findings of fact and conclusions of law and ordered judgment in favor of plaintiff, now on motion of Messrs. Craig, Weller & Laugharn and Thomas S. Tobin of counsel, it is.

Ordered, Adjudged and Decreed that the plaintiff have and recover judgment against the defendant in the sum of \$1240, without [33] interest, to the date of entry of this judgment and with costs in favor of the plaintiff.

Done at Los Angeles Southern District of California this 10th day of Feb., 1950.

/s/ JAMES M. CARTER,
U. S. District Judge.

Approved as to Form Under Local District Rule.

GENDEL & RASKOFF,
/s/ MARTIN GENDEL,
Attorneys for Defendants.

[Endorsed]: Filed and entered Feb. 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the Above-Entitled Court:

Notice Is Hereby Given that S. V. Jubas, defendant above named, hereby appeals to the United States Court of Appeals for the 9th Circuit, from the final judgment entered in this Court on February 10, 1950, in Judgment Book No. 63 at Page 729, and from the whole thereof.

Dated this 6th day of March, 1950.

GENDEL & RASKOFF,
By /s/ H. MILES RASKOFF,
Attorneys for Defendant-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 10, 1950. [35]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION
OF RECORD ON APPEAL

To: The Clerk of the Above-Entitled Court:

S. V. Jubas, defendant above named, through his counsel, hereby designates the entire record before the District Court, including all the papers, pleadings, evidence and exhibits filed with the District Court.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedures for the United States District Courts, and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the 9th Circuit, as amended, request is hereby made that the Clerk of the above-entitled Court transmit all the [37] original papers in the file dealing with the action or the proceedings in which the appeal has been taken, including the Notice of Appeal and this Designation.

Dated: This 6th day of March, 1950.

GENDEL & RASKOFF,

By /s/ H. MILES RASKOFF,

Attorneys for Defendant-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 10, 1950. [38]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 39, inclusive, contain the original Complaint; Answer; Pre-Trial Order; Defendant's Exhibit A; Findings of Fact and Conclusions of Law; Judgment and Decree; Notice of Appeal and Designation of Record on Appeal which, together with original reporter's transcript of proceedings on December 21, 1949, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 14th day of April, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

In the United States District Court, Southern District of California, Central Division

No. 10392-C Civil

PAUL W. SAMPSELL, Trustee in Bankruptcy
for the Estate of FASHION BOOTERY, a
Copartnership Composed of GENE FAGAN
and LEO G. OLSON, Bankrupt,
Plaintiff,

vs.

S. V. JUBAS, Doing Business Under the Fictitious
Firm Name and Style of WEST COAST JOB-
BING COMPANY,
Defendant.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Wednesday, December 21, 1949

Appearances:

For the Plaintiff:

CRAIG, WELLER & LAUGHARN,
by THOMAS S. TOBIN, ESQ.,
111 West 7th Street,
Los Angeles, California.

For the Defendant:

GENDEL & RASKOFF,

by MARTIN GENDEL, ESQ.,

617 South Olive Street,
Los Angeles, California.

The Court: Call the next case.

The Clerk: No. 10392-C Civil, Paul W. Sampsell v. S. V. Jubas, for trial.

Mr. Gendel: Ready for defendant.

Mr. Tobin: Ready for plaintiff.

GENE FAGAN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Gene Fagan.

Direct Examination

By Mr. Tobin:

Q. Where do you live, Mr. Fagan?

A. 3666 Glenfeliz Boulevard.

Q. You are one of the bankrupts in the matter of the Fashion Bootery, Bankrupt? A. Yes.

Q. A copartnership consisting of you and Leo Olson? A. Yes.

Q. What kind of business were you in?

A. Retail shoe store.

(Testimony of Gene Fagan.)

Q. Located where? [2*]

A. 520 South Hill.

Q. And you were selling shoes to the public?

A. Yes.

Q. By the individual pair?

A. Individual pairs.

Q. At retail? A. At retail.

Q. You were not in the wholesale business?

A. No, sir.

Q. On August 11, 1948, you sold 1240 pairs of shoes to one customer, did you?

A. Sold 1240 pairs of shoes to a jobber.

Q. Sy Jubas? A. Sy Jubas.

Q. What had you paid for those shoes?

A. They ranged from—anywhere from five and a quarter, five seventy-five, to eight fifty, consisting of stock in that price category.

Q. Per pair? A. Per pair.

Q. About how many pairs of shoes did you have in your stock at that time?

A. We had over 4,000 pair.

The Court: Counting the 1240?

The Witness: Well, I had rubber goods and stuff like [3] that that I didn't count.

The Court: The 12,000, does that include the 1240, or after you had sold the 1240?

Mr. Tobin: Your Honor said "12,000." It was 4,000.

The Witness: Close to 5,000 pair, 4,000, 5,000 pair, I wouldn't know exactly.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Gene Fagan.)

The Court: Do you count the 1240 or do you except the 1240?

The Witness: We counted the 1240.

Q. (By Mr. Tobin): How much did you sell those shoes to Mr. Jubas for?

A. I sold them for a dollar—I tried to get more—because they were shoes that we had accumulated, you know what I mean, they were odds and ends, we accumulated in stock and had, you know what I mean, that the public wouldn't buy.

Q. Had you put on any clearance sales?

A. Yes, sir.

Q. Prior to that? A. Yes, sir.

Q. But in any event when you sold these 1240 pairs of shoes to Mr. Jubas you did not record a notice of intention at least seven days before this sale to sell this 1240 pairs?

The Court: That has been stipulated to.

The Witness: I didn't know anything about that.

Q. (By Mr. Tobin): And those were shoes out of your [4] retail stock, were they?

A. Well, yes, that we accumulated.

Q. How many customers had you sold 1240 pairs of shoes to prior to that?

Mr. Gendel: Your Honor, I think that is covered by the stipulation.

The Court: I think it is stipulated that he never previously sold that many shoes. The only other previous occasion when he sold any bulk amount

(Testimony of Gene Fagan.)

of goods was an occasion when he sold a bunch of rubber, some 200 pairs, something like that.

Is that about right?

Mr. Tobin: Yes, your Honor.

The Court: That is in the stipulation.

Mr. Tobin: That is all. Just a minute.

Q. (By Mr. Tobin): At the time that you sold these shoes to Mr. Jubas were you indebted to any creditors who were creditors in your bankruptcy proceeding? A. Yes, I was.

Q. Directing your attention to Elsie Bleich, there is a claim on file in the bankruptcy proceeding based on a promissory note signed by your partner and yourself of some \$2200?

A. That's right.

Q. Was that owing at that time? [5]

A. Yes, sir.

Q. And it has never been paid?

A. That's right.

Q. And the claim is in the bankruptcy proceeding? A. I believe so.

Q. Were you also indebted to a man by the name of Elmer Sikorsky at that time? A. Yes, sir.

Q. In the sum of \$250? A. That's right.

Q. And has that ever been paid?

A. No, sir.

Mr. Tobin: That is all.

(Testimony of Gene Fagan.)

Cross-Examination

By Mr. Gendel:

Q. Mr. Fagan, with reference to the Elsie Bleich amount of \$2200, was that a loan to the partnership, or was it a loan to individuals?

A. Well, I guess they loaned it to us, to the——

Q. Do you understand the distinction between the partnership and yourself individually?

A. Well, I think that they loaned it—in fact, her son-in-law was working for us, that is how we secured the money. [6]

Q. Was that a loan made prior to January of 1948? A. Yes, sir.

Q. That was while Abe Nedelman was still in the business? A. That's right.

Q. Did Nedelman sign the note, too?

A. Yes, sir.

Q. It was Nedelman, Olson, and yourself that signed the note, is that right?

A. That's right.

Q. What was this Sikorsky loan?

A. Well, that was made in '47.

Q. To whom was that loan made?

A. It was made to us, Abe Nedelman and myself.

Q. In the preceding business, is that right?

A. Yes.

Q. This business was organized in January, '48, when Abe Nedelman took over the San Pedro store by himself, is that right? A. Yes.

(Testimony of Gene Fagan.)

The Court: What is the significance of that, counsel? What difference would it make whether these loans were incurred at the time Nedelman was a partner, before his withdrawal?

Mr. Gendel: I wanted to satisfy myself, Judge Carter, [7] that these were partnership loans. I am satisfied that these are partnership creditors. From Mr. Fagan's testimony that appears to be obvious.

Q. (By Mr. Gendel): Mr. Fagan, how long have you been in the shoe business?

A. I have been in it around 35, 36 years, longer.

Q. Has a good part of that experience been in the County of Los Angeles?

A. Quite a bit of it.

Q. All right. Are you familiar with the method and practice used by retail shoe stores in the Los Angeles community in disposing of these obsolete and accumulated odds and ends of shoes?

Mr. Tobin: That would be objected to as irrelevant, incompetent, and immaterial, not tending to excuse compliance with the bulk sales law.

The Court: I have your point in mind and I have thought about it. In one sense, actually, what counsel is going to try to do is to prove a practice to violate the law.

I am going to overrule the objection and let the witness answer and see what the evidence shows.

Mr. Tobin: May all that testimony go in subject to the objection?

(Testimony of Gene Fagan.)

The Court: Your objection may go to the entire line of testimony. [8]

Q. (By Mr. Gendel): Would you answer the question, please?

A. In this interruption my thoughts wandered.

The Court: Read the question.

(The question referred to was read by the reporter as follows: "All right. Are you familiar with the method and practice used by retail shoe stores in the Los Angeles community in disposing of these obsolete and accumulated odds and ends of shoes?")

The Witness: To the best of my knowledge I can answer some of it. They accumulate, any department store or shoe store accumulates odds and ends, it doesn't have to be in season or out of season, and they sell those to jobbers or even small stores like myself.

Q. (By Mr. Gendel): Then you are familiar with that method and that practice of disposing of these obsolete shoes, is that right?

A. I believe so.

Q. In connection with such sale, do you know whether or not that method and practice includes the filing of a notice of intention to sell under Section 3440 of the Civil Code?

Mr. Tobin: The same objection.

The Court: Same ruling.

A. That I don't know. [9]

Q. (By Mr. Gendel): Well, to your knowledge

(Testimony of Gene Fagan.)

of the method and practice did it include the requirement that there be any notice under 3440?

A. No, sir.

Q. You had never done it? A. No.

Q. And you never heard of it ever being done, had you? A. No, sir.

Q. You have been in the shoe business how long?

A. A little over 36 years.

Q. I believe you touched on the effort you made to dispose of these shoes and said that you tried to get more than a dollar and the best you could get was a dollar? A. That's right.

Q. Did you offer the shoes to jobbers, more than one jobber? A. Yes, sir, I did.

Q. And the highest and best offer you could get was a dollar, is that right? A. Yes.

Mr. Tobin: That is objected to as not being binding on the creditors affected by this transfer.

The Court: One of the issues may be. What would be the value of the shoes?

I think it might have some bearing on that. Objection [10] overruled.

Q. (By Mr. Gendel): As the owner of those shoes did you consider that the reasonable value of the shoes was one dollar per pair when you sold them to Mr. Jubas?

A. Well being an owner I would think they would be worth more, but that is the best I could get, because the shoes were broken—pretty well broken in sizes. What the merchant would value

(Testimony of Gene Fagan.)

it and what a jobber or the public would value it is not the same, because if we put them on sale they didn't take to it, because we couldn't fit just every type foot that would come in.

Q. You couldn't sell it to the public, the only one you could sell it to was a jobber, and the most you could get was a dollar a pair, is that right?

A. That's right.

Q. Mr. Fagan, about what percentage, in value, money value, did those 1240 pairs of shoes bear to the remaining shoes you then had on hand?

A. Well, I couldn't say offhand. I imagine around fifteen, sixteen, seventeen, somewhere in there, per cent. I don't know just exactly.

Q. Didn't you state on one occasion before the referee that it was less than 10 per cent?

A. If I did, I don't recall. It has been quite a long time ago. I can't remember the exact words.

Q. Could it have been less than 10 per cent?

A. It could have been. It could have been more.

Q. But in the neighborhood of 10 per cent?

A. Yes.

Q. More or less? A. Somewhere in there.

Q. All right. Mr. Fagan, did you make any other job-lot sales after the sale of this merchandise to Mr. Jubas? A. I don't recall.

Q. Had you already ordered replacement merchandise?

A. Yes. That is the reason I sold those shoes was to replace them. Those were high heels. The style had changed. In the novelty business, if you

(Testimony of Gene Fagan.)

know anything about shoes, they change so fast, seasonable merchandise, and I had shoes coming to replace that by new shoes, which we went in a different set-up of what they call Cuban heels, lower heels, more substantial for the average type to walk in.

Q. Then this bulk sale, if we can call it that, to Mr. Jubas was not any part of a series of job lots where you were selling out all your merchandise, is that right? A. No, sir.

Q. All you were doing was clearing your obsolete stock to take on fresh merchandise, is that right?

A. That's right.

Q. Isn't it true that this obsolete stock had [12] accumulated——

A. Over a period of time.

Q. ——over a period of time? A. Yes.

Q. And you might have been able to salvage more from a jobber if you had sold them at the end of each season instead of waiting several seasons, isn't that right? A. That's right.

Q. In other words, they were pretty old by the time they got to Mr. Jubas for the sale of them, isn't that correct? A. Yes.

Mr. Gendel: That is all.

Redirect Examination

By Mr. Tobin:

Q. Isn't it a fact that at the time of this transaction with Mr. Jubas your stock totaled some-

(Testimony of Gene Fagan.)

where between eight and ten thousand dollars in value? A. Before selling?

Q. At the time of the sale to Jubas.

A. We had more stock than that.

Q. About how much did you have?

A. I wouldn't know in round figures. I know we had probably close to fifteen, eighteen thousand dollars. [13] We took that inventory, the value we paid for it as an inventory.

Q. You carried them on your inventory at the value for which you had agreed to pay?

A. What I paid for them.

Q. Is that right?

A. Which we paid for them.

Q. And they were sold to Jubas for about one-fifth or less of that inventory value?

A. If we had taken—yes. If we had taken the mark-down from season to season, these pairs that would accumulate—for instance, if you have 9½ triple A and it doesn't move, and you don't get a call for it, and that shoe is still carried in your stock, naturally the style changes on it, especially in novelty shoes, in high-heeled shoes. We paid good money during the war for that stuff, and the merchandise, a lot of it, was quite inferior.

Mr. Tobin: That is all.

Mr. Gendel: That is all, Mr. Fagan.

The Court: Mr. Clerk, we will interrupt to call the Gordon case.

(Other court matters.)

The Clerk: Sampsell v. Jubas.

Mr. Tobin: The plaintiff rests.

Mr. Gendel: Mr. Jubas, will you come forward, please? [14]

SIMON V. JUBAS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gendel:

Q. What is your name, please?

A. Simon V. Jubas.

Q. Spell that for the reporter.

A. J-u-b-a-s.

Q. Where do you reside?

A. 337 North Poinsettia Place.

Q. Is that Los Angeles? A. Los Angeles.

Q. You are the defendant in this action, are you?

A. Yes, sir.

Q. Mr. Jubas, how long have you been in the shoe business? A. Approximately 25 years.

Q. Has a good part of that been in the city of Los Angeles? A. Yes, sir, since 1927.

Q. Have you ever had any dealings with retail shoe stores during that time? A. Yes. [15]

Q. Describe your primary business over these years.

A. My business is buying close-outs, manufacturers' close-outs, wholesale close-outs, and retail close-outs of every type and description.

(Testimony of Simon V. Jubas.)

Q. When you referred to close-outs, are you referring to the same thing as job lots?

A. Yes, job lots.

Q. You say you have been doing that for about 25 years? A. Approximately, yes.

Q. Are you personally familiar with the usual practice and method of the retail shoe merchants in the County of Los Angeles in disposing of these job lots of shoes? A. Yes, I am.

Q. What does a job lot of shoes usually consist of?

A. A job lot of shoes could consist of the following: They could consist of men's shoes, ladies' shoes, children's shoes, slippers, shoes in general that a retail store would have or a wholesaler or manufacturer.

Q. Let's keep it now to a retail shoe merchant in the County of Los Angeles.

A. Did you want me to explain what the method of the business is from a jobbing standpoint in buying jobs?

Mr. Tobin: For the purpose of the record I would like to renew my objection to this line of testimony on account of [16] it being a different witness.

The Court: The objection may go to the entire line of questioning. The objection is overruled.

Q. (By Mr. Gendel): Describe what ordinarily goes into a job lot when you buy it from a retail shoe merchant.

(Testimony of Simon V. Jubas.)

A. A job lot—I don't know how to explain the question he asked me. The retailer would run a retail sale at the end of the season usually, a good merchant would take at the end of the season and close out his merchandise to a jobber.

Q. What does he close out to a jobber?

A. His broken-up lines, the lines of shoes that he wants to discontinue handling, the lines of shoes that don't move with him, the lines of shoes that he has exhausted in trying to dispose of them through the retail channels, and then as a last resort he sells them to a jobber or an outlet store.

Q. All right. In connection with any of these job-lot sales by retail shoe merchants in the County of Los Angeles, is it their regular and usual method and practice to sell these job lots without filing a notice, as we describe it, under Section 3440 of the Civil Code?

A. In the period of time that I have been in the job-lot buying I have never heard of a job lot being disposed of that they complied with the bulk law sales act. It is a [17] method that the shoe industry uses in disposing of the shoes. They try to get the best price for them and they sell them.

Q. And that sale is without any notice of sale under Section 3440, is that right?

A. That's right.

Q. All right. Tell us if you can now recall what was in the job lot of shoes that you bought on August 11, 1948, from Fashion Bootery.

(Testimony of Simon V. Jubas.)

A. They consisted of shoes that were purchased immediately after the war, a type of shoes that were very inferior; the retailer at that time, that is, immediately after war couldn't buy as many shoes or wherever he wanted to buy shoes, he had to buy wherever he could buy them, and as a result of that and as a result of the condition at the time, they had bad merchandise, inferior uppers, inferior soles, it was a question of not where you wanted to buy, it was a question of, rather, to obtain the merchandise, and as a result of that a great many merchants were naturally stuck with goods.

Q. Mr. Jubas, I am now asking you to describe as best you now recall the 1240 pairs of shoes you bought from Fashion Bootery.

A. Some of the shoes consisted of oxfords that had soles that you could—the soles were soles that were of a composition leather than you could write on the wall with them. [18]

Q. You mean the kind that left black marks on the floor?

A. Yes. Some of the shoes consisted of odd lots of shoes that the Fashion Bootery—that they, in turn, had bought jobs from jobbers. There were shoes that, as a natural accumulation of the broken sizes, and the styles, become obsolete. It was a general lot of shoes that he had no other avenue to dispose of them other than to try to sell them to a jobber or outlet store.

Q. Mr. Jubas, what did you do with the shoes after you got them?

(Testimony of Simon V. Jubas.)

A. When I got the shoes, it is our custom to take the shoes and straighten them out.

Q. What did you do with the shoes?

A. Took them to my place of business.

Q. Then what did you do with them?

A. I called—I would call in Mr. Aldrich from the Western Shoe Store and try to dispose of them to him. I offered the shoes to him for a dollar fifteen cents a pair. He told me at that time, why he saw these shoes—these shoes had the name on the boxes, “Fashion Bootery,” he said, “You bought these shoes from the Fashion Bootery. They were offered to me at a dollar and a quarter a pair, I didn’t want to have them at that time.” And he passed them by and didn’t want them. I called, I believe, the Beverly Bootery. [19] They were in to look at the shoes and they, in turn, advised me, because these shoes——

Q. Mr. Jubas, you tried to sell them, did you, in turn, to another jobber and outlet stores?

A. To retail outlet stores.

Q. And you were unsuccessful, is that right?

A. That’s right.

Q. What did you do with the shoes?

A. The only avenue left to me was when I received better shoes, to try to work them in with these other shoes, a little here with one lot and a little with another lot, and tried to dispose of them.

Q. To the best of your present knowledge about how much did you net on these 1240 pairs of shoes for which you paid \$1240?

(Testimony of Simon V. Jubas.)

A. It is pretty hard to answer that question. I can answer it in one way, and another way I can't answer it. By themselves it was very, very difficult for me even to get my money back. It was only through trying to work them in with other jobs that I bought. That way I could just give you a figure to the best of my ability.

Q. Give us your best estimate.

A. They probably would have averaged me a dollar and a quarter, about that.

Q. In other words, you feel that after you disposed of [20] the shoes in the method you have described to the court, that you got about a dollar and a quarter for each pair of shoes for which you had paid a dollar, as an overall average?

A. That's right.

Mr. Gendel: That is all.

Cross-Examination

By Mr. Tobin:

Q. Mr. Jubas, you are familiar with the bulk sales law of California? A. Yes.

Q. And you very frequently record bulk sales notices? A. Yes, sir.

Q. In connection with job lots? A. No.

Q. Under what circumstances do you publish and record the 7-day notice?

A. When I buy a stock, regardless of how small it may be, it may be a \$150 stock, that is, the entire stock, I would comply with the bulk sales law. That

(Testimony of Simon V. Jubas.)

is when a man is going out of the business entirely. Or if I went in and bought the greater portion of his stock, or he was going out of business and selling me the men's shoes, I would comply with the bulk sales law act.

Q. In other words, you would record the notice if you [21] were buying the greater portion of the stock?

A. If I bought the entire stock, or if he was closing out the entire line, say, of men's shoes or children's shoes, or he was going out of the shoe business, and he would sell me because of my highest bid on the men's shoes.

Q. Let us assume that a man was in the shoe business and he was going to close out his men's shoes entirely, and retain his women's and children's shoes; if you bought the entire portion of the stock that consisted of men's shoes, you would record the notice?

A. If he was going out of business, yes.

Q. If he was discontinuing?

A. And if the stock ran 60, 70 per cent of their stock, the greater portion of their stock.

Q. You would record it? A. Yes, sir.

Mr. Tobin: That is all.

Mr. Gendel: That is all.

The Court: How did you happen to use the words "greater portion of the stock"?

The Witness: Your Honor, when I go into a store and see the man has got approximately stock

(Testimony of Simon V. Jubas.)

of \$20,000, and I see that his stock would run \$10,000 in shoes, or I would have a talk with him and he would tell me he is going out of the business, out of the shoe business—— [22]

The Court: But why do you make reference to the words “greater portion of the stock”? You say you would publish the notice in the event you were buying a greater portion of the man’s stock, 50 or 60 per cent, but you wouldn’t publish if it was, say, 30 per cent. Why do you attach any significance to the words “greater portion of the stock”?

The Witness: It all depends, your Honor, on the circumstances.

The Court: Do you think that the word “greater portion” are in that statute 3440?

The Witness: I would say that it is. If I walked in a man’s store and he had \$20,000 worth of merchandise, and he wanted to sell me \$12,000 worth—in the first place, when you walk into a store, the owner would say to me “I have \$10,000 worth of men’s shoes, I want to dispose of it, I want 50, 60, 75 cents on a dollar,” I would ask him, “How much does your entire stock amount to?”

The Court: Why would you ask him that?

The Witness: To determine as to how much he would want for the shoes. They would try to sell it to you on a percentagewise base. If I know the man is going out of the men’s shoe business, then I would go through escrow with him. But when a

(Testimony of Simon V. Jubas.)

man wants to close out his odds and ends in short and broken lines, your Honor, then it is a different thing. [23]

The Court: You have read the statute, haven't you?

The Witness: Yes, sir.

The Court: The words "greater portion" don't appear in there. It says, "or a substantial part."

The Witness: If I may correct myself on it, your Honor. I feel this way: When a man is going to close out his entire line of a certain stock that he has, maybe the man's stock, he is going out of it entirely, he is discontinuing that line, I would go through escrow with him.

Mr. Gendel: I would say the witness is giving judicial construction in trying to define "substantial." I think that is the layman's definition of what he thinks "substantial" means, Judge.

The Court: No further questions.

Mr. Tobin: That is all.

Mr. Gendel: No questions.

Your Honor, I have here in the court room three retail merchants. I think two of the three saw the specific items and are familiar with the method and custom and practice of retail shoe stores, but it appears to me that there is no contest on it. I don't know whether it would be of assistance to the court or merely cumulative to call these witnesses.

The Court: There is a factual question and a legal question. There appears to be no dispute that it may have been the custom of retail merchants

to close out accumulation [24] of odd lines, and it may have been their practice to do it without complying with Section 3440. However, that raises a legal question whether a practice of merchants——

Mr. Gendel: If that factual situation is acceptable to the court, I don't think these gentlemen would add anything, and it would be our job from that point forward to attempt to convince your Honor as to whether or not this particular sale came under 3440.

Mr. Tobin: As far as we are concerned, if your Honor please, I don't feel that these witnesses could add anything as far as the value is concerned, because Mr. Jubas has testified he sold them for a dollar and a quarter a pair, and that would establish the value, or it would be practically conclusive on the value, because the bankrupt testified that he couldn't get over a dollar a pair for them. Jubas said he got a dollar and a quarter a pair for them. I think that would fix the value.

The Court: Do you want to enter into a stipulation as to what these witnesses would testify to, subject to your objection, Mr. Tobin?

Mr. Tobin: Yes, your Honor.

Mr. Gendel: May we stipulate that the three witnesses if called would qualify as expert retail shoe merchants in the City of Los Angeles, and that they would testify that in the regular method and practice of the conduct of their [25] business, that they close out job lots of obsolete and broken and old lines of shoes without any compliance with Section 3440 of the Civil Code?

Mr. Tobin: So stipulated.

The Court: So stipulated, subject to the objection made by the plaintiff as to the materiality of it.

The objection is overruled and the stipulation is accepted. The stipulation is accepted subject to the objection which counsel has made, and I will overrule the objection and admit it in evidence.

These men that would testify are in addition to those shown on Defendant's Exhibit A?

Mr. Gendel: Yes. I have some additional statements.

The Court: Do you want to offer Defendant's Exhibit A?

Mr. Gendel: Yes, I would. At this time the defendant offers as his next exhibit in order Defendant's Exhibit A, introduced for identification on December 9, 1949.

Mr. Tobin: That would be subject, of course, to our objection as to the materiality.

The Court: All right. Objection overruled.

The Clerk: Defendant's Exhibit A in evidence.

The Court: It will be admitted in evidence.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

The Court: Does that complete the case on the facts? [26]

Mr. Gendel: Defendant rests on the facts.

Mr. Tobin: No rebuttal.

The Court: Mr. Gendel, do you want to name the three witnesses?

Mr. Gendel: The ones here in the court room?

The Court: Yes.

Mr. Gendel: Mr. Aldrich, what is your first name?

Mr. Aldrich: Emil.

Mr. Gendel: Your name?

Mr. Warner: Mark Warner.

Mr. Gendel: I think Mr. Warner signed one of those statements, if I remember correctly.

And your name?

Mr. Prupis: Louis Prupis.

The Court: All right, counsel.

(Whereupon the case was argued to the court by counsel for the respective parties, which argument was reported by the court reporter but not transcribed at the request of counsel.)

The Court: Well, gentlemen, the statute in question, Section 3440, is of course a harsh statute; but, on the other hand, it has been put in the Civil Code of the State of California with a definite purpose in mind. It is for the purpose of advising creditors when some substantial part of the stock in trade is going to be sold. [27]

The statute says: “* * * the sale of a stock in trade, in bulk, or a substantial part thereof * * *.”

In the Markwell case there was approximately six per cent of the stock involved, a little less than six. In Schainman v. Dean, as I figure it out, the court said 4,000 out of twenty or twenty-five thousand,

which would be either 16 or 17 per cent. In dollars and cents, according to the testimony, the amount of goods here transferred was 16 or 17 per cent. In percentage of quantity of goods, it was approximately 31 per cent. I am inclined to believe, and I so hold, that there was a sale of a substantial part of the stock in trade.

Now we come to "otherwise than in the ordinary course of trade." That phrase, I think, means ordinary course of trade of the bankrupt, which was that of a retail shoe merchant.

What the rest of it means is doubtful. Maybe they meant to use the word "or" instead of the word "and," and put in a catch-all for other irregularities in transactions. But it uses the words "and in the regular and usual practice and method of business of the vendor." It is true I admitted in evidence testimony of what some of these other merchants did. But at the very best it could be argued that you were proving a practice that they were ignoring Section 3440. You are proving that they were selling as retail [28] merchants substantial parts of their stock in trade without reference to Section 3440. Certainly you couldn't obviate the provisions of Section 3440 by merely showing that people disregarded it.

My decision is that the transfer was in violation of Section 3440.

It is a reluctant decision, because it is a harsh statute.

As to the amount of damages, the goods were

purchased by Mr. Jubas for a dollar a pair. He got more for them, but he has testified that he had to work them into other lines. They couldn't, apparently, be transferred in bulk again by him for any profit to him, and I assess the measure of damages as \$1240.

Mr. Gendel: Will your Honor find that there was this method and practice that has been admitted in evidence?

Mr. Tobin: I don't think it is material.

The Court: I have taken the attitude that it is material. I do find, if it is of any value to you, that it was the practice of shoe merchants to sell blocks of their stock in trade in bulk, and it was their practice, also, to disregard Section 3440.

Mr. Gendel: Mr. Jubas may, because it sets a formula for other matters, decide to take an appeal on the thing, and I wanted to be sure that the finding would be clear on [29] that point.

The Court: I should have commented, also, that there is no question but what shoe merchants can carry on the practice of selling of their job lots, cleaning up their stock. The only thing is that they have to record a notice under 3440.

You probably weren't consulted in this case, counsel, before this was done, but I think the average lawyer if a client would come to him would have looked that section over and said, "Well, what does the section mean? The safe thing to do is to publish your notice of record and don't pay your money until you have recorded it."

Mr. Gendel: Judge, what has happened in this shoe industry is this, unfortunately: You have certain jobbers and outlet stores that travel up and down, for example, on the Coast, and the various merchants in the small communities that don't have access to people of that character expect these people coming along, they are competing with each other, and because of the practice and method that has developed over the years you don't have a situation where a merchant is willing to say to John Doe, the jobber, "All right, I will sell this job lot to you for a thousand dollars, but you can't pay me until"—as the statute now stands—"ten days from now," and the jobber himself is placed in the position where the notice goes out, we will say for argument's [30] sake—and that is, I think, one of the reasons they developed this practice over the years—and some other jobber comes in and wants to compete with him, and therefore you have a wrangle there which would result in more litigation for creditors and everyone concerned than the practice that they follow now, that when the items involved are items that accumulate in the ordinary course and are items that a good merchant would dispose of to get off his shelf, he does it in a job lot, he does it by means of making his bargain and concluding it.

It is not the type of business transaction which would ordinarily interest creditors, if it comes within the statute, in the sense that it is not an attempt, as in the Schainman case, to dispose of

all of his stock in job lots within a short period of time, pocket his money and walk away from his creditors. So that the practical aspects, I think, are the background of the method and practice that has been described to the court.

The Court: I am not commenting on all of that. I want to say that I find no wrongful conduct on the part of this defendant. But I do feel that one of the things involved here is that the jobber, seeing a chance to pick up what he thinks is a good buy—he wouldn't buy it unless he thought it was a good buy—probably doesn't record his notice because he may tip off some other buyer, and within the ten-day [31] period some other offer is made, and that may be one of the factors, and that may be what you mean by some of the confusion that may develop.

Mr. Gendel: You have a history here of dealings in this community way back as far as thirty, forty years.

The Court: I don't see any burden on Mr. Jubas to have gone down and recorded his notice. As a matter of fact, as far as protecting himself from other buyers, he could have made a contract that he would buy it at a dollar a pair, assuming that no creditor attached, and bind the seller not to sell anybody else at a higher price. All he had to do was to wait his ten days. There isn't any burden placed on merchants. You have got two practices. One is the practice of getting rid of some stock. Well, they can get rid of this stock,

but as I read the section if it is a substantial part of the stock in trade they are going to have to publish a notice. Now, the other practice that you attempt to prove is a practice that they disregarded Section 3440. Obviously from a legal standpoint the mere fact that people disregard a law does not change the law.

Mr. Gendel: There was no attempt, by showing what the parties do under these circumstances in the community, to show a disregard for the statute.

The Court: I don't mean it disrespectfully, but your showing did show that they didn't comply with Section 3440. [32]

Mr. Gendel: The point that I have in mind is this, and the reason that I think it is of importance: Let's assume for argument's sake that the practice of the shoe merchants was to sell in bulk—I mean to sell in job lots, and they did file these notices, making that part of their practice, whether it is required under 3440 or not, that is the way they did business, or for argument's sake, let's say their practice was to handle it through escrows, which aren't required by 3440, just to bring an analogy that will show what I have in mind. Now, if Mr. Jubas were to come along and surreptitiously buy the stock without opening an escrow, which is the practice in the community, just as we have a practice in Los Angeles of escrows on real property, we have a practice of using the title company, but in other states they don't use title companies, they use attorneys, that is the practice of the community,

attorneys go down to the County Recorder and they do their researching and give an opinion and abstract—that is the practice, I think, that the legislature had in mind in referring to the method and practice of the vendor, and in this instance I think we have shown that the community uses that method and practice and that the vendor used it. In other words, it isn't something which takes into consideration what is in a statute or what is not. It is a method of doing business, and I think that is what 3440 had in mind. [33]

The Court: I have made up my mind on it. You will be entitled to a finding as to that practice. Attorney for the plaintiff will prepare findings and judgment, unless they are waived.

Mr. Tobin: I will prepare findings.

Mr. Gendel: I will be out of the city probably from tonight——

The Court: Is ten days sufficient?

Mr. Tobin: Yes.

Mr. Gendel: I will possibly be out of the city from tonight until January 3rd.

The Court: Twenty days, then.

Mr. Tobin: As far as I am concerned, Mr. Gendel and I won't have any difficulty on the matter of technicalities.

Mr. Gendel: I didn't want the findings to get to your Honor without an opportunity to go over them.

Mr. Tobin: We are in the bankruptcy courts every day with and against each other, so we never have any difficulty.

The Court: I want to compliment both counsel. As I said, I did some independent research and I found all the things you found, but I didn't find anything else. And I want to tell Mr. Gendel that as far as the law is concerned I think those Circuit Court cases are kind of rough from your side of the case. The Markwell case particularly is persuasive.

Mr. Gendel: I think the Markwell case—this is what [34] I read from, your Honor; you might want to have it. The Markwell case I don't think really considered the substance of 3440 in the light of any serious examination, and although Judge Denman went off primarily on the question of whether a pledge was covered under 3440, I think the thing that induced him to do that was the obvious unfairness of the finding that the lower court was correct in holding it substantial.

It might not hurt for an appeal to be taken and reargue the thing in light of, you might say, "day-light of ordinary practice."

The Court: Court will stand adjourned. [35]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of March, A. D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed Mar. 21, 1950 U.S.D.C.

[Endorsed]: Filed April 17, 1950 U.S.C.A.

[Endorsed]: No. 12524. United States Court of Appeals for the Ninth Circuit. S. V. Jubas, doing business under the fictitious firm name and style of West Coast Jobbing Company, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy for the Estate of Fashion Bootery, a copartnership composed of Gene Fagan and Leo G. Olson, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 17, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 12524

PAUL W. SAMPSELL, Trustee in Bankruptcy
for the Estate of FASHION BOOTERY, a Co-
partnership Composed of GENE FAGAN and
LEO G. OLSON,

Appellee,

vs.

S. V. JUBAS, Doing Business Under the Fictitious
Firm Name and Style of WEST COAST JOB-
BING COMPANY,

Appellant.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant, S. V. Jubas, doing business under the
fictitious firm name and style of West Coast Job-
bing Company, intends to rely on appeal on the fol-
lowing points:

1. The District Court erred in holding that the
shoes sold by the bankrupt to the Appellant consti-
tuted a substantial part of the bankrupt's stock in
trade.

2. The District Court erred in holding that the
sale by the bankrupt to appellant was invalid under
Section 3440 of the Civil Code of the State of Cali-
fornia and Section 70(e) of the Bankruptcy Act

by reason of the failure to record and publish notice of intended sale.

3. The District Court erred in holding that the sale by the bankrupt to appellant was not in the ordinary course of trade or the usual course of business such as was engaged in by the bankrupt.

4. The District Court erred in awarding judgment to Appellee and against Appellant.

Dated: This 14th day of April, 1950.

GENDEL & RASKOFF,

By /s/ H. MILES RASKOFF,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 17, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

Appellant, S. V. Jubas, doing business under the fictitious firm name and style of West Coast Jobbing Company, does hereby designate the entire record, including all the papers, pleadings, evidence and exhibits certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal, as material to the consideration of the appeal.

Appellant hereby requests that the entire record so certified, together with this designation and the statement of points upon which appellant intends to rely, be printed.

Dated: This 14th day of April, 1950.

GENDEL & RASKOFF,

By /s/ H. MILES RASKOFF,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 17, 1950.

No. 12524.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

S. V. JUBAS, doing business under the fictitious name and
style of WEST COAST JOBBING COMPANY,

Appellant,

vs.

PAUL W. SAMPSELL, trustee in Bankruptcy for the estate
of FASHION BOOTERY, a copartnership composed of
GENE FAGAN and LEO G. OLSON, Bankrupt,

Appellee.

BRIEF OF APPELLEE

CRAIG, WELLER & LAUGHARN,

111 West Seventh Street, Los Angeles 14,

Attorneys for Appellee.

THOMAS S. TOBIN,
Of Counsel.

FILED

AUG 11 1950

PAUL P. O'BRIEN,
CLERK

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No. 12524.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

S. V. JUBAS, doing business under the fictitious name and
style of WEST COAST JOBBING COMPANY,

Appellant,

vs.

PAUL W. SAMPSELL, trustee in Bankruptcy for the estate
of FASHION BOOTERY, a copartnership composed of
GENE FAGAN and LEO G. OLSON, Bankrupt,

Appellee.

BRIEF OF APPELLEE

The issues involved in the above appeal as succinctly stated by the appellant are very simple, but we cannot agree with the construction placed by appellant on the District Court's Findings of Fact. The construction placed thereon by appellant would indicate that the trial court found that it was in the usual and ordinary course of the bankrupt's retail business to sell large quantities of merchandise to jobbers for resale without complying with Section 3440 of the Civil Code of California and therefore Jubas should have been absolved from the necessity of complying with that very important statute. It is true that the Court found in Finding VII, page 33, that:

“ custom had arisen and been followed in Los Angeles County, California, whereby retailers of shoes *ignoring Section 3440 of the Civil Code of California, the bulk sales law*, made it a practice to sell surplus and

obsolete merchandise to jobbers without recording any notice in the office of the County Recorder of the State of California, or publishing said notice as required under the bulk sales law, *and that this custom of ignoring the provisions of Section 3440 was followed in this instance by the bankrupt and the defendant herein, without any dishonest intent on their part.*" (Italics ours.)

In Finding IX, the Court found that the parties to said transaction, namely, bankrupt and defendant, could have, without difficulty, recorded and published the required Notice under Section 3440 of the Civil Code of the State of California. [Tr. p. 34.] In Conclusion of Law IV [Tr. p. 35], the Court concluded that notwithstanding the fact that other retailers and jobbers may have violated the provisions of Section 3440 in the past, such custom merely shows a custom to ignore the plain provisions of the law of the State of California, and does not constitute the ordinary course of trade or the usual course of business such as was engaged in by the bankrupt.

We consider the reasoning on which appellant's argument is predicated, to be decidedly specious and begging the question. Section 3440 of the Civil Code of California has been on the statute books in one form or another since 1872. From an examination of Chase California Codes of 1945, it would appear that this statute was first enacted in 1872 and was amended in 1895, 1903, 1917, 1923, 1925, 1939 and in 1945. Apparently this kept pace with the modernized trends of business as time elapsed. With all of these amendments over a period of approximately eighty years, if it were the intention of the Legislature to grant a special dispensation to jobbers of obsolete or surplus merchandise, it would have been very simple

to have added to Section 3440 a provision reading as follows:

“Provided, however, that the provisions of this section shall not be deemed to apply to a retailer selling a substantial part of his stock in trade in bulk for resale, if the merchandise so sold is obsolete, shop worn, or otherwise unsaleable to the public.”

The Legislature has not seen fit to do this and if jobbers in the interest of speed and expediency see fit to take a chance on purchasing merchandise without fulfilling the very simple requirements of Section 3440, they must then accept the consequences of their misplaced efficiency, if called to account.

It is not as though merchants with obsolete or unseasonable merchandise were faced with an insoluble dilemma. Appellant admits that the shoes in question were an accumulation of odds and ends, obsolete, broken sizes, out of style, and novelty shoes which had accumulated during the partnership's existence. (Appellant's brief, p. 4.) If this merchandise had been permitted to accumulate over a long period of time until it had become obsolete, a mere delay of seven days to record and publish the required Notice under Section 3440 of the Civil Code would not have been fatal. If the bankrupt had waited six months, or a year, or two years to dispose of this merchandise, a mere delay of seven days would have made little or no difference. By complying with these simple requirements, the defendant would have been fully protected in his purchase. By reason of his haste to get his hands on the bargain offered, he now finds himself mulcted for the purchase price he paid for these shoes for the sole reason that he bought them in violation of the law and for no other reason.

To urge this Court to reverse this judgment on the ground that certain people in Los Angeles, a small group in a city of almost two million, had set themselves up a system of buying merchandise in violation of the plain provisions of the law, is simply to ask this Court to place the stamp of judicial approval on a violation of the law, and we are certain that this Court will not be influenced by such specious reasoning.

For example, during the thirteen year era of National Prohibition, we all know that the Eighteenth Amendment and the Volstead Act were repeatedly violated not only by bootleggers and moonshiners, but by otherwise law-abiding citizens. The writer of this brief has read in the course of his practice, hundreds of decisions, if not thousands, involving liquor violations. We have yet to see a single instance in which a liquor conviction was reversed on the ground that "everybody is doing it." The same might be said of the income tax law. Everyone knows that many sharpshooters chisel on their income tax by means of trick bookkeeping and concealment of facts regarding their income. Nevertheless, neither the Government nor the Courts will excuse a violation of the income tax law on the ground that a custom has grown up among certain people to ignore its requirements.

So the same may well be said of this illegal custom which has grown up among certain business interests dealing in job lots, of ignoring the requirements of Section 3440, if it suits their convenience to do so. Notwithstanding this custom, when they are caught, they must pay the penalty.

Now that we have moralized sufficiently on this subject, we shall turn to a discussion of the law as it existed at the time of the transaction.

The Law.

Section 3440 of the Civil Code of California at that time provided that:

“The sale, transfer or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, or assignor, * * * will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, (or) assignor, * * * unless at least seven days before the consummation of such sale, transfer, (or) assignment * * * the vendor, transferor, (or) assignor, or the intended vendee, transferee, (or) assignee, * * * shall record in the office of the county recorder in the county or counties in which the said stock in trade * * * is situated, a notice of said intended sale, transfer, assignment, * * * stating the name and address of the intended vendor, transferor, (or) assignor, and the name and address of the intended vendee, transferee, (or) assignee, and a general statement of the merchandise or property intended to be sold, assigned, (or) transferred * * * and the date when and the place where the purchase price or consideration, if any there be, is to be paid; and shall publish a copy of such notice in a newspaper of general circulation published in the township in which such transfer or assignment is intended to be made, if there be one, and if there be none in such township, then in such a newspaper in the county embracing such township, at least once, which publication shall be completed not less than two days before the date of such intended sale, transfer, (or) assignment.”

Section 70e of the National Bankruptcy Act provides:

“A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act, which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

“All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State Laws.

“For the purpose of such recovery or of the avoidance of such transfer or obligations, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.”

There is no dispute but that at the time of this transfer, the bankrupt was indebted to two creditors, Elsie Bleich, in the sum of \$2,200.00, and Elmer Sikorski, in the sum of \$250.00, and the Court so found. [Finding X, Tr p. 34.] Either of these creditors, had bankruptcy not intervened, could have avoided this transfer and the trustee succeeded to their rights and is also entitled to avoid it for the benefit of the bankrupt estate. See *Moore v. Bay*,

284 U. S. 4. Or in the alternative, if deemed to the best interests of the bankrupt estate, he may recover the value of the property. *Buffum v. Barceloux*, 289 U. S. 227.

Exhaustive research on the part not only of the writer of this brief, but of able counsel for the appellant and Judge Carter, the trial Judge, discloses that California cases construing the bulk sales provisions of Section 3440 of the Civil Code are conspicuous by their absence and that the only two decisions in this jurisdiction construing these provisions insofar as they concern the disposition of a substantial part of the stock in trade of a retail merchant, are decisions of this Court, both of which are touched on and discussed in appellant's brief. We refer to *Schainman v. Dean*, 24 F. 2d 475, and *Markwell & Co. v. Lynch*, 114 F. 2d 373. This case was exhaustively briefed in the District Court by both parties and orally argued at its conclusion, and Judge Carter in rendering his decision, has relied very strongly on those two decisions by this Court construing the meaning of "a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor." We do not believe that decisions of other Courts in other States will govern. It is true that the Arkansas Supreme Court in *Fiske Rubber Co. v. Hayes*, 131 Ark. 248, held that \$150.00 worth of accessories out of a stock of \$1500.00 was not a "material portion of the stock within the meaning of the Arkansas Bulk Sales Act" and that the Supreme Court of North Carolina in *Armfield Co. v. Saleeby*, 178 N. C. 298, held that 179 barrels of apples worth \$450.00 out of a grocery stock in trade worth \$3,000.00 to \$5,000.00 was not a sufficient portion to bring the transaction within the Bulk Sales Act of that State. The Court will notice that those

cases involved statutes or rules of law which interdicted sales of a "large part or the whole of a stock of merchandise," or "a major part of such stocks." In the case of *Fudge v. Brown*, 218 Pac. 251, cited by the plaintiff, the Washington statute involved interdicted sales of "substantially the entire business or trade theretofore conducted by the vendor." Each of these Bulk Sales Acts were worded differently than our Section 3440, and this Court has twice been called upon to construe it.

In *Markwell Co. v. Lynch*, 114 F. 2d 373, a retail jeweler borrowed \$300.00 from the appellant and pledged with it a comparatively small portion of his stock. The value of the jewelry pledged was \$600.00. The bankrupt's stock in trade amounted to approximately \$9,500.00. The District Court following the rule laid down in *In re Convisser*, 9th Circuit, 6 F. 2d 177, set the pledge aside and rendered judgment in favor of the trustee. On appeal to this Court, this Court held that the \$600.00 worth of merchandise so pledged constituted a substantial part of the bankrupt's stock in trade in the following language:

"It should be borne in mind that the statute does not prohibit transfers of this sort. A valid pledge may be made if proper notice has been given so that those extending credit to the transferor may be put on their guard and enabled to protect themselves. We see no good reason to reverse the judgment. Affirmed."

Judge Denman who dissented, dissented on the sole ground that Section 3440 did not interdict a pledge of a substantial part of the bankrupt's stock in trade as distinguished from a sale, transfer, or assignment. We believe that the jewelry involved in this case consisted of three diamond rings, although it does not appear in the

opinion of this Court. In the other case cited in the lower Court, *Schainman v. Dean*, 24 F. 2d 475, Paul Schainman, a speculator, purchased from Isidore Lichtenberg, who later became a bankrupt, merchandise of the value of \$4,000.00 out of a total stock running between \$20,000.00 and \$25,000.00. Judgment was rendered against him for the value of the merchandise for the reason that neither of the parties to the transaction had complied with Section 3440. On appeal, after pointing out that the trustee had the option to sue for either the goods, or their value, this Court affirmed the judgment of the lower Court in the following language:

“The next contention is that the sale did not embrace a substantial part of the stock in trade. It appears from the testimony that the value of the stock transferred was the amount of the judgment, or approximately \$4,000. It further appears that the value of the entire stock in trade at the time of the transfer, or transfers, was from \$20,000 to \$25,000. It is manifest from the testimony that the sales were not made in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, and inasmuch as it appears that almost the entire stock in trade was sold at or about the same time, in the same manner, we think the court below was warranted in finding that the sale did involve a substantial part of the stock in trade, and came within the purview of the statute.

“It appeared incidentally at the trial that the purchase money derived from the sale of the goods was paid to certain creditors of the bankrupt, but this fact of itself would constitute no defense to an action at law for the recovery of the goods, or their value. If the transaction was free from actual fraud, or fraud in fact on the part of the purchaser, it may be

that this disposition of the purchase money would entitle him to some relief under proper pleadings; but even this is questionable. The statute declares in express terms that a sale made without giving the requisite notice is conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, and, as said by the court in *Calkins vs. Howard*, 2 Cal. App. 233-236, 83 P. 280-281: 'This presumption is incontrovertible. Where the law makes a certain fact a conclusive presumption, evidence will not be received to the contrary.' And if, as against the purchaser, the transfer is conclusively presumed to be fraudulent, neither law nor equity will relieve him from the consequences of his acts."

We might observe in passing, that appellant lays some stress on the fact that it appeared in the *Schainman* case that almost the entire stock of trade was sold at or about the same time in the same manner (Appellant's brief, p. 15). That would be of no concern to the appellant, *Schainman*, in that case, and certainly would not constitute any defense to this defendant here. It may be, that in the *Schainman* case, there was a taint of actual fraud and that evidence was adduced for the purpose of showing possible actual fraud, that other similar sales had been made at or about the same time, thus depleting the bankrupt's stock. However, the *Schainman* case turned on violation of Section 3440 and nowhere in the opinion do we find any language which would indicate that there was actual fraud in the transaction such as appeared in the case of *Brainerd v. Cohn* (C. C. A. 9th), 8 F. 2d 13. In the case of *Brainerd v. Cohn*, the opinion clearly shows that there was actual fraud and a conspiracy, but included in the pattern of fraud was a violation of Section 3440 of the Civil Code of California. We do not contend that

Mr. Jubas was guilty of any actual fraud. His career in his field, to the writer's knowledge, over a period of years has been honorable. We do contend, however, that he was guilty of carelessness in his dealings with the bankrupt and in this respect fell afoul of the law, and that custom on the part of a certain few persons in ignoring the Bulk Sales Law cannot be invoked to excuse him.

Conclusion.

We agree with counsel for the appellant that the amount involved in this case from the dollar view point, is comparatively small, but that the legal issue involved is of great importance. The trial court gave Mr. Jubas the benefit of every possible doubt. It declined to render judgment against him for these shoes at the rate of \$1.25 per pair, the price at which Jubas resold them. [Testimony of Simon B. Jubas Tr. p. 58], but rendered judgment only at the rate of \$1.00 per pair, the purchase price which he had paid for them. The testimony of the bankrupt was that he had paid \$5.25, \$5.75 to \$8.50 for these shoes when he bought them. [Tr. p. 43.] As pointed out before, all that was necessary to have insured the safety of this transaction would have been to record the Notice required and publish it. Mr. Jubas testified at page 56 that the shipment consisted of shoes that were purchased immediately after the war, so as heretofore pointed out, seven days delay would not have made any difference. He admits that he was familiar with the Bulk Sales Law of California. [Tr. p. 58.] He admits that on some occasions he complied with it, when he was purchasing an entire stock even as low as \$150.00. [Tr. pp. 58, 59.] He admits that he had read the statute in question. [Tr. p. 61.] Only carelessness on his part, or

haste to close the bargain, prevented his recording the requisite Notice.

We do not think that this case, involving comparatively a small amount, should be permitted to constitute an entering wedge by which Section 3440 can be gradually undermined. If 1240 pairs of shoes out of close to 5,000 pairs [Tr. p. 43] will now be held by this Court to not constitute a substantial part of a stock in trade of a retail merchant, then this Court may later be asked to declare that 12,400 pairs of shoes out of a stock of 50,000 pairs, does not constitute a substantial part of such stock, and so on *ad infinitum*.

We respectfully submit that the judgment of the District Court should be affirmed.

CRAIG, WELLER & LAUGHARN,

By THOMAS S. TOBIN,

Attorneys for Appellee.

THOMAS S. TOBIN,

Of Counsel.

No. 12525

United States
Court of Appeals
For the Ninth Circuit.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

VS.

VIRGINIA BINGER,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

FILED

JUN 16 1957

PAUL P. O'BRIEN,
Clerk

No. 12525

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee:

ANDREW R. BRATTER,
Security Bank Bldg.,
North Hollywood, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 9210-PH

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

VIRGINIA BINGER, DOES I to X,
Defendants.

COMPLAINT FOR RESTITUTION
AND INJUNCTION

For a First Cause of Action

I.

Plaintiff, as Housing Expediter, Office of the Housing Expediter, brings this cause of action for restitution pursuant to Section 205(a) to enforce compliance with Section 4 of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator pursuant to Section 2 of the Emergency Price Control Act of 1942, as amended, and/or brings this cause of action pursuant to Section 206 of the Housing and Rent Act of 1947, as amended, 50 U.S.C. Appendix 1881-1902, Public Law 464—80th Congress, 2d Session, and the Rent Regulations issued pursuant thereto.

II.

Jurisdiction of this cause of action is conferred upon this Court [2*] by Sections 205(c) of the Emergency Price Control Act of 1942, as amended, and/or Section 206 of the Housing and Rent Act of 1947, as amended.

III.

At all times mentioned herein prior to July 1, 1947, there was in effect a Rent Regulation for Housing issued pursuant to Section 2(b) of the Emergency Price Control Act of 1942, as amended, for the Los Angeles Defense Rental Area. At all times mentioned herein between July 1, 1947, and March 31, 1948, inclusive, there was in effect a Rent Regulation for Controlled Housing issued pursuant to Section 204(d) of the Housing and Rent Act of 1947 for said Defense Rental Area. At all times mentioned herein after March 31, 1948, there was in effect a Rent Regulation for Controlled Housing issued pursuant to Section 204(d) of the Housing and Rent Act of 1947, as amended, for said Defense Rental Area. At all times mentioned herein prior to July 1, 1947, the housing accommodations herein described have been subject to maximum rents authorized and established by the Emergency Price Control Act of 1942, as amended, and the said Regulations issued thereunder. At all times mentioned herein between July 1, 1947, and March 31, 1948, inclusive, said housing accommodations have been subject to maximum rents authorized and established by the Housing and Rent Act of 1947

* Page numbering appearing at bottom of page of original Reporter's Transcript.

and said Regulations issued thereunder. At all times mentioned herein after March 31, 1948, said housing accommodations have been subject to maximum rents authorized and established by the Housing and Rent Act of 1947, as amended, and said Regulations issued thereunder.

IV.

That the defendants, Does I to X, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued. [3]

V.

That the defendant is a resident of the City of North Hollywood, County of Los Angeles, State of California, in the Southern District of California, in the Central Division thereof. Defendant is within the jurisdiction of this Court.

VI.

During all times herein mentioned the housing accommodations known and described as 9715 Sunland Boulevard, Sunland, California, have been located within said Defense Rental Area.

VII.

Defendant received from persons for the use and

occupancy of the said accommodations rents in excess of the maximum rents established by said Rent Regulations. A Schedule is attached hereto and by reference made a part hereof, as though fully set out herein. Said Schedule states the names of the persons occupying said accommodations and the period of occupancy of such persons. Said Schedule states the rents received from said persons during said times. Said Schedule states the legal maximum rent for said accommodations during said times. Said Schedule states the amount of the overcharges received from said persons during said times.

For a Second Cause of Action

Plaintiff re-alleges and incorporates herein Paragraphs I, II, III, IV, V, VI, and VII of his first cause of action as though set out in full herein.

II.

In the judgment of the Housing Expediter, Office of the Housing Expediter, said defendants have engaged in acts and practices in violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and/or in violation of Section 206(a) of the Housing and Rent Act of 1947, as amended, 50 U.S.C. Appendix 1881-1902, Public Law 464—80th Congress, 2d Session, which acts and practices consist of violations of Rent Regulations for Housing [4] (10 Fed. Reg. 13528) issued in accordance with Section 2(b) of the Emergency Price Control Act of 1942, as amended, and/or the Controlled Hous-

ing Rent Regulation issued pursuant to the Housing and Rent Act of 1947, and therefore the Housing Expediter brings this cause of action pursuant to the provisions of Section 206 of the Housing and Rent Act of 1947, as amended. Jurisdiction of this cause of action is conferred by Section 206 of the Housing and Rent Act of 1947, as amended.

Wherefore, the plaintiff demands:

A. That the defendant be ordered and directed to tender to all available tenants as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Emergency Price Control Act of 1942, as amended, and Regulations issued thereunder, and/or the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, which were received by the defendant, his agents, servants, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by said Acts and said Regulations, or, in the alternative that the defendants be ordered and directed to pay the amount of the overcharge to the United States of America.

B. A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation with them from:

1. Directly or indirectly demanding or receiving amounts in excess of the maximum legal rent, or

from discontinuing, withholding, suspending, or shutting off the normal supply of heat, light, gas, hot and cold water, janitorial services, or other essential services and utilities, or threatening to do any of the foregoing.

2. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

3. Violating the Housing and Rent Act of 1947, as amended, and Regulations issued thereunder, as heretofore or hereafter amended or superseded, by accepting, demanding, or receiving [5] in any form or manner, rents higher than the established maximum rent prescribed therein.

4. Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled, or managed by the defendants, or from evicting said tenants in any form or manner contrary to the Housing and Rent Act of 1947 and Regulations issued thereunder, as heretofore or hereafter amended or superseded.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ RICHARD G. SOLOF,
Attorneys for Plaintiff. [6]

Housing accommodations located at 9715 Sunland Blvd., Sunland, California. Unit, 9715; Name of Tenant, Mr. & Mrs. J. D. Acton; Period of Overcharges, 4-1-47 to 5-17-48; Amount Rent Paid, \$25.00 Wk.; Maximum Rent \$40.00 Mo.; Amount of Overcharges, \$915.00. Total Amount Overcharges \$915.00.

Statement referred to in Paragraph VII of plaintiff's first cause of action.

[Endorsed]: Filed February 4, 1949. [7]

[Title of District Court and Cause.]

ANSWER

Now Comes the above-named defendant, and for answer to the first cause of action alleged in the complaint herein, denies, admits and alleges as follows:

I.

Answering paragraph VII of the first cause of action alleged in said complaint, the defendant denies each and every allegation contained therein; and specifically denies receiving the rents as alleged from the tenants named in said complaint; and specifically denies that the maximum rent was \$40.00 per month.

II.

As and for a further and additional defense to paragraph VII of the first cause of action alleged

in said complaint, defendant alleges that the overcharges of rent alleged to have been collected from April 1, 1947, to February 3, 1948, occurred more than one year prior to the commencement of this action. [8]

For answer to the second cause of action alleged in said complaint, the defendant denies, admits and alleges as follows:

I.

Denies generally and specifically all of the allegations of paragraph VII, of the first cause of action in said complaint realleged in paragraph I of the second cause of action thereof.

II.

Denies generally and specifically each and every allegation contained in paragraph II of the second cause of action of said complaint herein.

III.

For a further defense to paragraph II of the second cause of action alleged in said complaint, defendant alleges that said tenants do not now occupy said housing accommodations and have not occupied the same for several months; and that defendant is not now, and since May 17, 1948, has not been the owner of the housing accommodation described in said complaint.

/s/ ANDREW R. BRATTER,
Attorney for Defendant.

State of California,
County of Los Angeles—ss.

Virginia Binger being by me first duly sworn, deposes and says: that she is the answering defendant in the above-entitled action; that she has read the foregoing Answer and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it is true.

/s/ VIRGINIA BINGER.

Subscribed and sworn to before me this 28th day of February, 1949.

[Seal] /s/ ANDREW R. BRATTER,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 1, 1949.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER RULE
36, FEDERAL RULES OF CIVIL PRO-
CEDURE

Comes now the plaintiff and requests the defendant, Virginia Binger, within ten days after service of this request, to make the following admissions for the purpose of this action only and subject to

all pertinent objections to admissibility which may be interposed at the trial pursuant to Rule 36 of the Federal Rules of Civil Procedure.

1. That defendant, Virginia Binger, is and at all times between April 1, 1947, and May 17, 1948, has been the landlord of and has received the rents for the housing accommodations described as 9715 Sunland Boulevard, Roscoe, California.

2. That the schedule attached to the complaint on file herein truthfully and correctly designates the names of the tenants who occupied the house for the period designated. If the defendant denies the truth of any part of this, she will specify the part denied. [11]

3. That the said schedule truthfully and correctly sets forth the period during which the named tenants occupied the designated house at the designated rent. If the defendant denies the truth of any part of this, she will specify the part denied.

4. That the said schedule truthfully and correctly designates the amount paid as rent by the said tenants. If the defendant denies the truth of any part of this, she will specify the part denied.

5. That in January or February of 1945, the named defendant, or Mrs. Victor A. Binger, registered the whole house at 9715 Sunland Boulevard, for the sum of \$40.00 per month.

6. That no Order of the Area Rent Director modifying the maximum legal rent for the whole house has ever issued.

7. That the maximum legal rent for 9715 Sunland Boulevard, when the same was rented as a whole house, has been at all times between April 1, 1947, and May 17, 1948, the sum of \$40.00 per month.

8. That no part of the rent paid has been refunded to the tenants, or either of them.

9. That no civil action against this defendant has been instituted by the named tenants, or either of them.

Pursuant to Rule 36 of Federal Rules of Civil Procedure, each of the above matters shall be deemed admitted unless within ten days of the service of this request, the defendant serves upon plaintiff the sworn statement or written objections described in said Rule 36.

Dated at Los Angeles, California, this 11th day of April, 1949.

ABE I. LEVY,
FRANK L. HIRST,
T. G. FITZGERALD,

By /s/ T. G. FITZGERALD,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 11, 1949. [12]

[Title of District Court and Cause.]

ADMISSIONS REQUESTED
UNDER RULE 36

Comes now defendant Virginia Binger, and in reply to plaintiff's request for admissions under Rule 36, Federal Rules of Civil Procedure, makes admissions and denials as follows:

1. Admits request No. 1.

2. In answer to request No. 2, denies that the names of the tenants are correctly designated. The tenants designated occupied one portion of the premises; and Joe Morris occupied another portion of the premises.

3. In answer to request No. 3, admits that the tenants herein named occupied the designated house, but not at the rents designated in said schedule.

4. In answer to request No. 4, denies that the tenants paid the rents set forth in the schedule; and asserts that said tenants paid \$12.50 per week.

5. Admits the statements in request No. 5.

6. Denies the statement in request No. 6.

7. Denies the statement in request No. 7.

8. Admits the statement in request No. 8.

9. Admits the statement in request No. 9.

Dated at North Hollywood, California, this 20th day of April, 1949.

/s/ ANDREW R. BRATTER,
Attorney for Defendant.

State of California,
County of Los Angeles—ss.

I, Andrew R. Bratter, being first duly sworn,
depose and say:

That I am the attorney for the defendant in the above-entitled action; that I have read the foregoing admissions requested under Rule 36 and know the contents thereof and that the truth of the same are hereby verified upon information and belief as I believe the matters therein stated to be true, and that this verification is made by me as attorney, for the reason that I am unable to communicate with the above-named defendant because the said defendant recently moved and has not yet informed me of her new address and did not leave a forwarding address at her last known place of residence.

/s/ ANDREW R. BRATTER,
Affiant.

Subscribed and sworn to before me this 21st day
of April, 1949.

[Seal] /s/ WILLIAM E. EMPEY,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 22, 1949. [15]

[Title of District Court and Cause.]

ADMISSIONS REQUESTED UNDER
RULE 36

Comes Now defendant, Virginia Binger, and in reply to plaintiff's request for admissions under Rule 36, Federal Rules of Civil Procedure, makes admissions and denials as follows:

1. Admits request No. 1.
2. In answer to request No. 2, denies that the names of the tenants are correctly designated. The tenants designated occupied one portion of the premises; and Joe Morris occupied another portion of the premises.
3. In answer to request No. 3, admits that the tenants herein named occupied the designated house, but not at the rents designated in said schedule.
4. In answer to request No. 4, denies that the tenants paid the rents set forth in the schedule; and asserts that said tenants paid \$12.50 per week.
5. Admits the statements in request No. 5. [17]
6. Denies the statement in request No. 6.
7. Denies the statement in request No. 7.
8. Admits the statement in request No. 8.
9. Admits the statement in request No. 9.

Dated at North Hollywood, California, this 30th day of April, 1949.

/s/ ANDREW R. BRATTER,
Attorney for Defendant.

State of California,
County of Los Angeles—ss.

Virginia Binger, being by me first duly sworn,
deposes and says:

That she is the defendant in the above-entitled action; that she has read the foregoing Admissions Requested Under Rule 36 and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it is true.

/s/ VIRGINIA BINGER.

Subscribed and sworn to before me this 30th day
of April, 1949.

[Seal] /s/ ANDREW R. BRATTER,
Notary Public in and for the County of Los An-
geles, State of California.

Receipt of copy attached.

[Endorsed]: Filed May 2, 1949. [18]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for trial on January 30, 1950, before the Honorable Charles C. Cavanah sitting without a jury; plaintiff being represented by Asher Scheir, Esq., and defendant, Virginia Binger, being represented by Andrew R. Bratter; the evidence having been introduced and the court having heard the argument of counsel, makes the following:

Findings of Fact

I.

That at the time of filing the complaint herein, defendant, Virginia Binger, was a resident of the County of Los Angeles, State of California; and during the times in question was a landlord of controlled housing described as 9715 Sunland Boulevard, Sunland, California, within the Los Angeles Defense Rental Area.

II.

That said controlled housing, during the times in question, [20] April 1, 1947, to May 17, 1948, were rented as follows: The front bedroom with the use of additional rooms and facilities, and all utilities furnished, to Mr. and Mrs. J. D. Acton, at \$12.50 per week; the back bedroom with the same facilities, to Joe Morris, at \$12.50 per week; and that said defendant, Virginia Binger, reserved the right

to use one other room as sleeping quarters for herself.

III.

That the said rents as charged by said landlord for said accommodations were equal to the maximum legal rent for said rooms in said controlled housing during the period in question.

Conclusions of Law

I.

That the court has jurisdiction of the parties and the said controlled housing.

II.

That the controlled housing which are the subject of this action, are within the premises located at 9715 Sunland Boulevard, Sunland, Los Angeles, California, and were for the period commencing April 1, 1947, and ending May 17, 1948, rented as controlled housing within the purview of the Housing and Rent Act of 1947 as amended.

III.

That said controlled housing were in all respects rented in accordance with the provisions of the Housing and Rent Act of 1947, as amended, and the regulations issued pursuant thereto, and not in violation thereof.

IV.

That the defendant, Virginia Binger, is entitled

to judgment against the plaintiff, that the plaintiff take nothing by this action.

Dated this 13th day of February, 1950.

/s/ CHARLES C. CAVANAH,
Judge of the United States
District Court.

Submitted:

.....
Attorney for Defendant.

Receipt of copy attached.

[Endorsed]: Filed February 13, 1950. [21]

In the District Court of the United States, South-
ern District of California, Central Division
No. 9210-PH-CIVIL

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,
Plaintiff,
vs.

VIRGINIA BINGER, DOES I TO X,
Defendant,

JUDGMENT

The above-entitled matter came on regularly for trial on January 30, 1950, before the Hon. Charles C. Cavanah, Judge of the above-entitled Court, sitting without a jury; the plaintiff being represented by Asher Scheir, Esq., and the defendant

Virginia Binger, being represented by Andrew R. Bratter, Esq., the evidence having been introduced by the parties and the cause having been submitted to the court for decision; the court having made and filed its findings of fact and conclusions of law herein, declaring that defendant, Virginia Binger, is entitled to judgment against the plaintiff; and a true and correct copy of said findings having been duly served upon the above-named plaintiff, and the time for objections thereto having expired,

It Is Ordered, Adjudged and Decreed that the defendant, Virginia Binger, have judgment against the plaintiff herein, that the plaintiff take [24] nothing by this action.

Dated this 13th day of February, 1950.

/s/ CHARLES C. CAVANAH,
Judge of the United States
District Court.

Presented by:

/s/ ANDREW R. BRATTER,
Attorney for Defendant.

Approved as to form:

/s/ ASHER SCHEIR,
Attorney for Plaintiff.

[Endorsed]: Filed and entered February 13, 1950. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the entire final Judgment entered in this action on the 14th day of February, 1950.

Dated: Los Angeles, California, this 31 day of March, 1950.

ABE I. LEVY,
ASHER SCHEIR,

By /s/ ASHER SCHEIR,
Attorneys for Appellant, Tighe E. Woods, Housing
Expediter, Office of the Housing Expediter.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 31, 1950. [26]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The following are the Points upon which the appellant intends to rely upon the appeal:

1. The Court erred in holding that the maximum rent for the housing accommodations was \$25.00 per week, the aggregate of the maximum rents for two sleeping rooms, and not the sum of \$40.00 per month, the maximum rent for the entire unit.

2. The Court erred in holding that the violations alleged in the Complaint were not established and in refusing to grant judgment in favor of the plaintiff as prayed for in the complaint. [28]

Dated: Los Angeles, California, this 31st day of March, 1950.

ABE I. LEVY,
ASHER SCHEIR,

By /s/ ASHER SCHEIR,
Attorneys for Appellant, Tighe E. Woods, Housing
Expediter, Office of the Housing Expediter.

[Endorsed]: Filed March 31, 1950. [29]

In the United States District Court, Southern
District of California, Central Division

No. 9210-PH

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

VIRGINIA BINGER, DOES I to X,

Defendants.

Honorable Charles C. Cavanah, Judge Presiding

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Monday, January 30, 1950

Appearances:

For the Plaintiff:

ASHER SCHEIR, Esq.,

1206 Santee Street,

Los Angeles 15, California.

For the Defendant Virginia Binger:

ANDREW R. BRATTER, Esq.,

208 Security Bank Building,

North Hollywood, California.

Mr. Scheir: I will call Mr. Hamlin.

The Court: This is one item involved of overcharge?

Mr. Bratter: That is correct.

EDWIN D. HAMLIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please?

The Witness: Edwin D. Hamlin.

Direct Examination

By Mr. Scheir:

Q. Mr. Hamlin, by whom are you employed?

A. Office of the Housing Expediter.

Q. In what capacity?

A. Chief rent attorney.

Q. In your capacity as chief rent attorney are you familiar with and do you have access to the official records of the Housing Expediter for the Los Angeles Defense Rental Area?

A. Yes, I do.

Q. Do you have with you the official records pertaining to 9715 Sunland Boulevard in Sunland, California? [2*]

A. Yes, I do.

Q. Mr. Hamlin, I show you what purports to be a registration statement covering a six-room unit at 9715 Sunland Boulevard, Roscoe, California, and ask you if that is a copy of the official records of the Office of the Housing Expediter?

(Testimony of Edwin D. Hamlin.)

A. Yes, it is.

Mr. Bratter: No objection.

Mr. Scheir: If the court please, I offer in evidence the registration statement covering house at 9715 Sunland Boulevard, Roscoe, California, as Plaintiff's Exhibit No. 1, and I ask leave to withdraw the original and substitute therefor a photo-static copy.

The Court: All right, you may do so.

(The document referred to was marked Plaintiff's Exhibit 1, and was received in evidence.)

Q. (By Mr. Scheir): Mr. Hamlin, are there any other orders or documents affecting the house as a whole at 9715 Sunland Boulevard which would change the maximum rent as shown on the registration statement now in evidence as Plaintiff's Exhibit No. 1?

A. No, there are not, as to the whole house.

Q. Are there any records as to individual rooms in that house? A. Yes, there are.

Q. Mr. Hamlin, I show you a registration statement [3] covering front sleeping room at 9715 Sunland Boulevard, and ask you if that is part of the official records of the Office of Housing Expediter?

A. Yes, it is.

Mr. Scheir: Did you want to see this? I offer that.

Mr. Bratter: Yes. There is no objection.

The Court: It will be admitted.

(Testimony of Edwin D. Hamlin.)

(The document referred to was marked Plaintiff's Exhibit 2, and was received in evidence.)

Mr. Scheir: Counsel, in all these instances will you stipulate I may substitute a photostatic copy?

Mr. Bratter: Yes. I wonder if the record could show the dates on these two documents, so the court can have the dates in mind for this phase of the matter.

Mr. Scheir: If your Honor please, the photostatic copy contains all the information.

Mr. Bratter: For the convenience of court and counsel, I think the date should be shown, so that the court will know what we are talking about.

The Court: Give him the date.

Mr. Scheir: The registration statement now in evidence as Plaintiff's Exhibit No. 1 bears the date of January 24, 1945. I offer in evidence the photostatic copy of the registration statement covering front sleeping room at 9715 Sunland Boulevard as Plaintiff's Exhibit No. 2, and that was [4] received in the Office of the Housing Expediter on April 30, 1947.

Q. (By Mr. Scheir): Mr. Hamlin, I show you an order adjusting maximum rent issued June 18, 1947, affecting the front sleeping room at 9715 Sunland Boulevard, Roscoe, California, and ask you if that is part of the official records of the Office of Housing Expediter?

A. Yes, sir, it is.

(Testimony of Edwin D. Hamlin.)

Mr. Bratter: There is no objection.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit 3, and was received in evidence.)

Q. (By Mr. Scheir): Mr. Hamlin, I show you what purports to be a registration statement covering the back sleeping room at 9715 Sunland Boulevard and ask you if that is part of the official records of the Office of the Housing Expediter.

A. Yes, it is.

Mr. Bratter: And that date is what?

Mr. Scheir: April 30. That was received in the Office of the Housing Expediter on April 30, 1947.

Mr. Bratter: No objection.

The Court: It will be admitted.

(The document referred to was marked Plaintiff's Exhibit 4, and was received in evidence.)

Q. (By Mr. Scheir): Mr. Hamlin, I show you what purports [5] to be an order adjusting maximum rent issued June 18, 1947, covering the back sleeping room at 9715 Sunland Boulevard, Roscoe, California, and ask you if that is part of the official records of the Office of the Housing Expediter.

A. It is.

Mr. Bratter: No objection.

The Court: Admitted.

(Testimony of Lillian M. Acton.)

(The document referred to was marked Plaintiff's Exhibit 5, and was received in evidence.)

Q. (By Mr. Scheir): Mr. Hamlin, are there any other registration statements or orders affecting the accommodations at 9715 Sunland Boulevard? A. No, there are not.

Mr. Scheir: I have no further questions, your Honor.

Mr. Bratter: No further questions.

The Court: You will be excused.

(Witness excused.)

Mr. Scheir: Mrs. Acton.

LILLIAN M. ACTON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Lillian M. Acton. [6]

Direct Examination

By Mr. Scheir:

Q. Mrs. Acton, have you ever lived at 9715 Sunland Boulevard, in Sunland, or Roscoe, California?

A. Yes, I have.

Q. During what period of time did you live there?

A. From the first week of April, or the rent

(Testimony of Lillian M. Acton.)

started the first, but we didn't move in until a couple of days later, until July 9, 1948.

Q. That was April of what year? A. 1947.

Q. To May of what year? A. July.

Q. July of what year? A. 1948.

Q. During the time you occupied 9715 Sunland Boulevard, who lived there with you?

A. My husband and my two sons.

Q. How old were your sons when you went there?

A. One was—well, he is thirteen now. He was eleven, I think, when we lived there, and the other was twenty-three.

Q. During the time you occupied 9715 Sunland Boulevard, to whom did you pay your rent?

A. Mrs. Binger.

Q. How much rent did you pay during the period of time [7] you lived there?

A. \$25.00 a week.

Q. You paid \$25.00 every week that you lived there from the period April 1st, 1947, to July of 1948? A. Yes, we did.

Q. Mrs. Acton, how did you learn of these particular accommodations?

A. Through an advertisement in the paper, in the Citizen-News.

Q. Do you remember the date on which this advertisement appeared in the Citizen-News?

A. March 26, I believe.

Q. Of what year? A. 1947.

(Testimony of Lillian M. Acton.)

Q. Mrs. Acton, I show you what purports to be a photostatic copy of page 22 of the *Citizen-News* dated Wednesday, March 26, 1947. I call your attention to the advertisement enclosed in red, and ask you if that is the advertisement which you read?

A. Yes, that is.

Mr. Bratter: I object to this as being wholly immaterial, for the reason——

Mr. Scheir: I haven't offered it yet, your Honor. I will offer this now, and you can make your objection. I offer this, your Honor, as Plaintiff's next exhibit. [8]

The Court: That is an advertisement?

Mr. Scheir: Advertisement from a newspaper, yes, your Honor.

The Court: Why is it admissible?

Mr. Scheir: It is admissible for this reason: The issue in this case, your Honor, is whether or not these people rented the house as a whole, in which event the maximum rent of \$40.00 would apply. If they rented individual rooms, it is the contention of the defendant then the room rent would apply. That is why I offered in evidence all the documents pertaining to these particular premises, not only the registration statement covering the house in its entirety, but also the registration statements and orders for the individual rooms.

The Court: This is an advertisement in the paper.

(Testimony of Lillian M. Acton.)

Mr Scheir: The advertisement in the paper will help the court to determine whether or not this house was rented in its entirety or whether individual rooms in the house were rented by these people.

The Court: Objection sustained to the offer. In this case the question is what did the parties do.

Q. (By Mr. Scheir): Mrs. Acton, did you have any negotiations with Mrs. Binger relative to the renting of these accommodations at 9715 Sunland Boulevard? A. Yes, I did. [9]

Q. Do you recall when you had those negotiations with her? A. March 28, 1947.

Q. Where were those negotiations held?

A. Her home in North Hollywood.

Q. Was anybody present besides you and Mrs. Binger? A. Yes, sir, my son, my older son.

Q. Please tell the court what was said by you.

Mr. Bratter: Just a moment. Will you ask her who was present?

Mr. Scheir: She said her son, her older son.

Mr. Bratter: What is his name?

The Witness: Morris, Joe Morris.

Q. (By Mr. Scheir): Joe Morris is your son?

A. Yes, he is.

Q. By a former marriage? A. Yes.

Q. Will you please tell the court what was said at the time that you had your negotiations with Mrs. Binger relative to the renting of these particular premises?

A. She asked me if we had transportation, be-

(Testimony of Lillian M. Acton.)

cause there was no transportation out there, and how long we wanted to live there, and she had the house up for sale at the time and she said it would be taken off the market, and then when she said that we could rent the house she made the receipt out for——

Mr. Bratter: Your Honor, I will object to any testimony by this witness except the conversations that were had, the statements made by Mrs. Binger to her and statements made by her to Mrs. Binger.

The Court: Well, that is all she has testified to, and having a receipt that was made out, she said. Go ahead. That is all she has testified to.

The Witness: The receipt was made out for \$25.00, rooms with kitchen privileges, and I asked why they were being made out that way, and that I was not looking for rooms, I wanted a house. She said, "That has nothing to do with it, you are renting the house and the house is yours for as long as you want it." This is the way I got my receipt. I called in the O.P.A. after that.

The Court: You speak of a house. What is this, rooms or a house?

The Witness: No, sir, it is a house.

The Court: It is a house?

The Witness: Yes, sir, a five-room house.

The Court: Go ahead.

Q. (By Mr. Scheir): What does this house consist of, Mrs. Acton?

A. A living-room, dining-room, kitchen, two bedrooms and a service porch. [11]

(Testimony of Lillian M. Acton.)

Q. Did Mrs. Binger tell you how much the rent would be? A. Yes, she did.

Q. What did she say?

A. She said \$25.00 a week.

Q. Mrs. Acton, I show you what purports to be a receipt dated March 28, 1948, for \$25.00, and ask you if that is the receipt which was given to you by Mrs. Binger when you first rented the house.

A. Yes, it is.

Mr. Scheir: If the court please, I offer it in evidence.

Mr. Bratter: No objection.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit 6, and was received in evidence.)

Q. (By Mr. Scheir): Mrs. Acton, did you receive receipts each time you paid the rent?

A. Yes, I did.

Q. I show you what purports to be two receipts attached one to the other, dated April 8, 1947, and ask you if those receipts were received by you for payment of the rent? A. Yes, they were.

Mr. Bratter: No objection.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit 7, and was received in evidence.) [12]

Q. (By Mr. Scheir): Mrs. Acton, at various

(Testimony of Lillian M. Acton.)

times did you receive receipts in that form, one attached to the other, whenever you paid the rent?

A. Yes, I did.

Q. Mrs. Acton, I show you a series of such receipts and ask you if those represent most of the receipts that you received when you paid the rent to Mrs. Binger.

A. Yes, they do.

The Court: Don't you think that you could examine those in some recess? It is going to take a long time to go through all those.

Mr. Bratter: Very well, your Honor. Could the ruling on their acceptance in evidence be reserved?

The Court: Reserved until you have a chance to examine them.

Q. (By Mr. Scheir): Now, Mrs. Acton, during the time you occupied these premises did you yourself have access to the entire house?

A. Yes.

Q. And did your husband have access to the entire house?

A. Yes.

Q. Did both of your sons have access to the entire house?

A. That is right. [13]

Mr. Scheir: I have no further questions of this witness, your Honor.

The Court: Any cross-examination?

Mr. Bratter: Yes, your Honor.

The Court: Proceed.

Cross-Examination

By Mr. Bratter:

Q. Mrs. Acton, when you called at the home of

(Testimony of Lillian M. Acton.)

Mrs. Binger in the latter part of March, 1947, wasn't there a Mrs. Smith also present?

A. No, sir, there was no one else in the room.

Q. Did you at that time tell Mrs. Binger that Mr. Morris is your son by a prior marriage, at that time age twenty-three, was also interested in getting a room for himself? A. No, sir.

Q. Did Mrs. Binger at that time tell you that she would rent you and Mr. Acton a room for \$12.50 per week?

A. No, sir, I was not interested in a room.

Q. And that in connection with that room you would have privileges in the house, the kitchen and bathroom? A. No, sir.

Q. Is the dining-room closed off from the remainder of the house by a door? A. No, sir.

Q. There is no door? [14]

A. There is a door on to the hallway, but there is no doorway between the kitchen, and there is a big archway between the dining-room and the living-room, and there is an open doorway between the dining-room and the kitchen.

Q. There is a davenport with a folding bed in it in the dining-room, is there not?

A. Yes, that is right.

Q. And a clothes closet as well?

A. No, sir, there is no clothes closet.

Q. Inside of the dining-room or adjacent to it?

A. No, sir.

Q. Did Mrs. Binger tell you at that time that

(Testimony of Lillian M. Acton.)

the reason she was renting out rooms in this house was because she was being threatened with eviction herself and may have to vacate and move into that house and she would keep the dining-room for her own room?

A. Rooms were not mentioned at all.

Q. Answer yes or no, did she tell you that?

A. No, sir.

Q. Some of these receipts that you have identified here are made out to Mr. Morris and some are made to you, isn't that correct?

A. That is right.

Q. Where a receipt calls for or is for \$25.00 it states that it is for two weeks' rent, isn't that correct? [15]

A. That is right. That is what the receipts say.

Mr. Bratter: That is all.

Redirect Examination

By Mr. Scheir:

Q. Mrs. Acton, was the cooking for the entire family done in the kitchen?

A. That is right.

Q. Did the entire family use the dining-room at the same time daily? A. Yes.

Mr. Scheir: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Scheir: Mr. Morris, please.

KERMIT J. MORRIS, JR.,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: State your name.

The Witness: Kermit J. Morris, Jr.

By Mr. Scheir:

Q. Mr. Morris, are you related to Mrs. Acton, who was on the witness stand just before you?

A. Yes.

Q. In what way is she related to you?

A. She is my mother.

Q. Did you occupy the premises at 9715 Sunland Boulevard at the time your mother did?

A. I did.

Q. Were you present at the time your mother had these negotiations with Mrs. Binger relative to the rent of the house at 9715 Sunland Boulevard?

A. Yes.

Q. Will you tell the court what took place at that time?

A. Well, I remember that there was some rent paid and receipts given for rent.

Q. Do you recall any of the conversations had at that time between your mother and Mrs. Binger?

A. No, not very much of it.

Q. Did you yourself enter into any of the discussions? A. No.

Q. Did you at any time rent or offer to rent a

(Testimony of Kermit J. Morris, Jr.)

room from Mrs. Binger at these premises?

A. No.

Q. Did you hear any discussion about the renting of rooms at these premises?

A. No, I didn't. [17]

Mr. Scheir: No further questions.

Cross-Examination

By Mr. Bratter:

Q. What was your business at the time you went to Mrs. Binger's house in March, 1947?

A. I was employed by Flying Tiger Air Lines as a flight radio operator.

Q. How long had you been an aviator?

A. I had been an aviator for approximately three years in the Army, and at that time I had worked for the Flying Tiger Lines for approximately three months.

Q. And were you present when your mother had this conversation with Mrs. Binger, I mean close enough so that you could hear what was said?

A. At times I was, I believe, yes.

Q. State whether or not it is a fact that the first part of the conversation dealt with negotiations for a room for Mr. and Mrs. Acton at \$12.50 per week.

A. I don't remember that.

Q. State whether or not at the time the negotiations were under way and after arrangements had been made for such a room, that Mrs. Acton then said to Mrs. Binger that you would like to rent a room also under the same conditions.

A. No. [18]

(Testimony of Kermit J. Morris, Jr.)

Q. You don't recall that?

A. No, I never heard that.

Mr. Bratter: That is all.

Mr. Scheir: No further questions of this witness, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Scheir: Mrs. Lacy.

MADGE LACY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Madge Lacy.

Direct Examination

By Mr. Scheir:

Q. Mrs. Lacy, what is your business or occupation? A. I am a real estate broker.

Q. Where is your office located?

A. 6727 $\frac{1}{4}$ Hollywood Boulevard.

Q. On or about March 26, 1947, was your office located at 6727 $\frac{1}{4}$ Hollywood Boulevard?

A. 1947, yes.

Q. Are you here in response to a subpoena duces tecum [19] in which you were directed to bring certain records with you? A. Yes.

Q. Do you have those records with you?

A. No.

(Testimony of Madge Lacy.)

Q. Where are those records, do you know, Mrs. Lacy? A. No.

Q. Do you know what happened to them?

A. No. No reason why I should keep them.

Q. You don't have them?

A. No, they are simply information on houses, but I keep all my receipts of what people pay me.

Q. Do you know Mrs. Binger?

A. I have only seen her one time until—at that time, that was a year ago, she came to my office to list some property upon Hubbard Street. That is all I know.

Q. Did she ever list the property at 9715 Sunland Boulevard with you?

A. Well, Mrs. Binger did list something, I couldn't tell you what, I don't know, in fact I have no evidence to show where it was located. I don't recall.

Q. Do you know Mrs. Acton?

A. Well, she came in the other day and said, "Mrs. Lacy, you remember me?" At first I said I didn't know her. Then she said, "Remember, I am the one that went to Mrs. Binger's." I said, "Are you?" That is all I know. [20]

Q. You don't recall sending her to 9715 Sunland Boulevard?

A. I remember sending somebody out there. I am supposed to tell what I know only, not tell—

Q. You are only to tell what you remember. That was the way the question went. Do you recall sending someone out to 9715?

(Testimony of Madge Lacy.)

A. Well, I do remember sending someone to Mrs. Binger's. The only thing, I couldn't tell—of course, I had thousands of these listings come into my office every couple of months.

Q. Mrs. Lacy, I show you a photostatic copy of page 22 of the *Citizen-News* for March 26, 1947, and call your attention to the ad which appears therein enclosed in red and ask you if you had that ad inserted in the paper.

Mr. Bratter: Just a moment. I am objecting to that, your Honor, for the same reasons given before. That is this advertisement that was offered before.

Mr. Scheir: Your Honor, I am trying to show how these premises were listed, that they were listed as a house.

Mr. Bratter: How is this binding on these parties? What is published in newspapers and magazines. We are concerned with what these parties have said and done.

The Court: This is excluded. The court has ruled on that.

Mr. Scheir: Your Honor, this ad was inserted pursuant to [21] listing by Mrs. Binger with the Lacy Realty Company. We are trying to show how it was listed in the newspaper, and that is why my offer is made.

The Court: You claim it was listed by Mrs. Binger?

Mr. Scheir: That is correct, your Honor.

(Testimony of Madge Lacy.)

The Court: That is different.

The Witness: Oh, no, that was listed at my request. She had nothing to do with my advertisement. I just listed it at the number like I just listed that——

The Court: The objection is sustained. She said she had no knowledge.

The Witness: At that time she didn't even have any knowledge of it, no.

The Court: Go ahead. The court has ruled.

The Witness: I can't tell only from the original receipt or from the check number, the original receipt showing money that was given me. I always make a duplicate and give them the original, and then if they come back at any time and want to get any money back, I have the copy. I may have all those receipts, I don't know, I may have them, and I recall very little information on that. That is over three years ago.

Q. (By Mr. Scheir): Do you remember sending someone out to 9715 Sunland Boulevard?

A. I wouldn't say Sunland, but I sent someone to Mrs. [22] Binger's house out in the Valley, but the information, I don't know about that.

Q. Your sending someone to Mrs. Binger's property could only be at her request?

A. That is right, yes.

Q. Whenever you advertise any of your listings, all of your information is received from the person making the listing, is that correct?

(Testimony of Madge Lacy.)

A. That is right.

Q. In other words, whatever information you gave to the newspaper was information that you have received from the listing?

A. Yes, but I will say in all fairness that the chances are I put it on a weekly basis, and sometimes I might put it on a monthly basis, because sometimes people intend to pay on a weekly basis, and it is the same thing in the long run, so I wouldn't know. It isn't anything that would be vital, you know. I have no interest in this case at all.

Mr. Bratter: I think we are getting far afield with this witness. There is nothing brought out by her testimony that has anything to do with our question. It is all immaterial. I ask that all the testimony be stricken.

The Court: Not all of her testimony, no.

Mr. Scheir: It is very obvious, your Honor, if this witness sent someone to Mrs. Binger's property in the Valley [23] that she did it on instructions from Mrs. Binger, and received her information from Mrs. Binger. We are trying to show that this ad was inserted in the paper just about the time, if not just before the property was rented to Mrs. Acton, and that the only way that Mrs. Lacy could get this information was from Mrs. Binger, otherwise how could she send Mrs. Acton out to this property in the Valley, and it is listed in the newspaper under Houses and Apartments, and it is

(Testimony of Madge Lacy.)

listed as a house, and we contend that that will show what the intention of the parties was when they rented the house. Mrs. Acton did not visit the place pursuant to an ad listing rooms for rent. She visited the house pursuant to an ad listing a house for rent. That is our contention.

The Court: When you listed this house for rent, was that done at Mrs. Binger's request?

The Witness: No, Mrs. Binger knew nothing of it. I always took it on myself.

The Court: Took it on yourself?

The Witness: That is right. She knew nothing of it.

The Court: Sustained. You have objected and I have ruled.

Mr. Scheir: No further questions, your Honor.

Mr. Bratter: No questions.

The Court: They are through with you. You are excused.

(Witness excused.) [24]

Mr. Scheir: That is the plaintiff's case, your Honor.

(Whereupon the plaintiff rested his case.)

Mr. Bratter: Mrs. Binger, will you take the stand, please?

VIRGINIA BOYD BINGER,

the defendant herein, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Virginia Boyd Binger.

Direct Examination

By Mr. Bratter:

Q. Where do you reside, Mrs. Binger?

A. At 215 South Normandie.

Q. That is in Los Angeles? A. Yes, it is.

Q. Where were you residing in March of 1947?

A. 1816 North Wilton.

Q. In Los Angeles. Did you own a house at that time on Sunland Avenue in what is referred to here as the Valley? A. Yes, I did.

Q. That was in Roscoe? A. Yes. [25]

Q. And how large a house was that?

A. Well, it had two bedrooms, a kitchen, a dining-room, a service porch and a living-room, and then there was a space between the kitchen and the hall that had a closet in it and a dressing table, and the bath.

Q. Was the dining-room a separate room, separated from the rest of the house by a door that could be closed, or was that an open room?

A. No, the dining-room and the bedroom could be separated from the rest of the house. The bedrooms were off a hall.

Q. I am talking about the dining-room.

(Testimony of Virginia Boyd Binger.)

A. The dining-room, yes, was separated—it opened on into the living-room, but it was separated from the rest of the house.

Q. Was there any sleeping accommodation in the dining-room at that time?

A. Yes, I had put, when we had a chance to move in there I put a bed in there or davenport.

Q. And was the use of a cothes closet available to anyone occupying the dining-room for sleeping quarters?

A. Yes, that is what we used it for when we owned the home.

Q. Prior to March, 1947, was the home in the same physical condition as it was at the time you had the negotiations with [26] Mrs. Acton about the renting of the room, as to improvements?

A. You say at the time when it was listed was it in the same condition as it was——

Q. Prior to March, 1947.

A. No, it was not the same at all. Notice of completion was given after I had completed—when I got the house from Mr. Binger it was only partially furnished, partially finished, had no clothes closets, walls were not in, and doors were not in. It was not finished at all.

Q. Now, prior to March, 1947, particularly commencing in the year 1945, do you know as to whether or not there was a rent ceiling fixed on that home by the rent director in this area?

A. I didn't know anything about it at first, but

(Testimony of Virginia Boyd Binger.)

Mr. Binger went in the Service and I found out then.

Q. What was the rent ceiling at that time?

A. There wasn't any. He had rented it without putting a ceiling on it, so I put one on. I think that came out and it was already rented when they put the ceiling on. He had it rented to some people.

Q. What was the ceiling? A. \$40.00.

Q. \$40.00 per month?

A. For the house as is.

Q. As the house was then? [27]

A. Yes, it was not finished on the——

Q. Prior to March, 1947, and before you had negotiations with anyone about renting in 1947, what, if anything, was done to the house?

A. Well, first I had to settle the community property with Mr. Binger, then I got hold——

Q. Let's get down to any improvements, if any, made to the house.

A. That is what I am talking about. I had a contractor come in there and landscape everything, clean up the mess that they had left. That was the first thing I did. Then I had the contractor come in and go over the whole house to get it constructed and finished. There were doors with no doors, no clothes closets——

Q. You mean doorways without doors?

A. Yes, between the dining-room and the doorway to the kitchen.

Mr. Scheir: If your Honor please, I have no objection to this line of testimony in as far as it

(Testimony of Virginia Boyd Binger.)

is material to this action, but if improvements were made to the property, that made it more usable, that would have made a change in the matter of rental, and they would have to petition for an adjustment of rent.

The Witness: I didn't know that.

Mr. Scheir: That was never done to this time, and the [28] maximum rent could not be changed except on order of the area rent director.

Mr. Bratter: Your Honor, this is merely preliminary. Any action relating to recovery and restitution of rent is addressed to the equitable considerations of the court.

The Court: They are fixed.

Mr. Bratter: How is that?

The Court: The law regulates the procedure you have to take before the administrator before the court could vary it.

Mr. Bratter: This is merely preliminary to an action later taken by the rent director in changing, as we contend, in changing the rent ceiling on this property.

The Court: Well, overruled. Go ahead.

Q. (By Mr. Bratter): Make it very brief, but tell us what improvements were made thereto and the cost of those improvements?

A. Well, I took out an FHA of \$1500, and I paid out, I put on \$300—

Q. Mrs. Binger, how much did those improvements cost all told?

(Testimony of Virginia Boyd Binger.)

A. All together around \$3,000.

Q. Around \$3,000. How much ground did you have on this property?

A. I had an acre. [29]

Q. An acre of ground?

A. But I didn't use the back of it.

Q. And state whether or not it is correct to say that when you completed those improvements that you had a completed home all finished.

A. Sure.

Q. With the improvements all finished altogether. Now, in March of 1947, prior to the time that you met Mrs. Acton, was your house vacant?

A. Well, it was vacant because I had it up for sale, and my daughter lived there.

Q. Your daughter was occupying the property, but you had no tenants there?

A. I put them out when I got out.

Q. For how long a time had the place been without occupancy by tenants for hire?

A. I don't remember just exactly.

Q. Well, was it a matter of months?

A. I think so, yes, about three months. I don't remember exactly, because the people stayed on until they could find a place, before the place was finished.

Q. In March of 1947, the latter part of March, 1947, did you meet Mrs. Acton?

A. Yes, Mrs. Lacy sent Mrs. Acton out. All the while I had had dealings with Mrs. Lacy. [30]

(Testimony of Virginia Boyd Binger.)

Q. Where did you meet her?

A. At my home.

Q. Who was present at the time she came?

A. Well, her son was with her.

Q. When you say "her son" who are you referring to? A. Mr. Morris.

Q. That is Joe Morris who testified here a while ago? A. Yes.

Q. Who else, if anybody, was present?

A. Well, there were people in and out. Mrs. Smith, Eileen Smith was with me. I don't know whether she was there at the exact time, but she was there most of the time.

Q. She was there during the time that Mrs. Acton and Joe Morris were there talking to you about renting this place? A. Yes.

Q. In that regard we are more particularly concerned, possibly, with what the conversation was you had with Mrs. Acton and with Joe Morris, what they said and what you said concerning the rental of this place.

A. I don't remember word for word what I said, but I made it very clear that I would let them have the use of the whole house, but I had to rent it as rooms, because I had a little baby, and I showed—I said that I had had trouble where I was living and I didn't know when I would have to give [31] up my business and to move, and that I would rent them the house with use of kitchen privileges, using the bedrooms, and so she said that

(Testimony of Virginia Boyd Binger.)

her son might wish one, he was out of town most of the time.

Q. Now, when you first had your conversation with Mrs. Acton, was there anything said about the rental of two bedrooms by both Mr. and Mrs. Acton and by Joe Morris? A. No.

Q. What was the discussion centered upon?

A. It was strictly of Mrs. Acton talking about taking one and Mr. Morris taking another, and as far as I know, that is what I told Mrs. Lacy, that I wanted to rent the house with the bedrooms.

Q. What did Mrs. Acton say to you about renting the bedroom? What did she say to you in substance, not word for word, but substantially what did you say and what did they say?

A. Well, I just said that I would never interfere with them but I just wanted a place in case I had to vacate at any time, if I needed a place, the landlord was deceased, and I needed a residence, you know, a place to bring my baby to, after all I had a little baby.

Q. Very well. What was said about the rent that was to be paid by Mrs. Acton and the rent that was to be paid by Joe Morris? [32]

A. Well, \$25.00. I had stated every two weeks would be \$25.00, \$25.00 for both rooms, \$12.50 apiece.

Q. \$25.00 every two weeks? A. Yes.

Q. Was that for each room?

A. \$12.50 apiece.

(Testimony of Virginia Boyd Binger.)

Q. What was that to include, just the use of each room?

A. The whole use of the house and the grounds. I didn't want to interfere with them at all except that I wanted to keep the whole thing, so I just wanted the protection, that is to say, in case I had to—I have got daughters to go to, but I was having difficulty at the house where I was living in, so I got out there quite often. That is why I took it off of the market.

Q. What about the use of the utilities? Who was to pay for the utilities, water, gas and electricity?

A. I paid all utilities, gas, light and water, which amounted to——

Q. Did you agree at that time, when you had your conversation with them and after you talked about the rent being \$12.50 a room or \$25.00 for the two rooms, what was said then about the payment of utilities?

A. I said I would furnish the light and gas, I could rent—usually in town they usually furnish them light, gas [33] and water.

Q. And that included light and water as well?

A. Water and everything.

Q. Prior to that time when you had the place and when it was rented under the former ceiling of \$40.00 a month, what arrangements were made about the payment of utilities?

A. Well, the gas and light was in Mr. Binger's

(Testimony of Virginia Boyd Binger.)

name. You see, I didn't own the house at the time.

Q. Answer me specifically. Who paid the utilities before, the tenant or did you?

A. The tneant paid us.

Q. The tenant paid you, so when he paid \$40.00 a month he paid that merely for the use of the premises and paid his utilities in addition to that?

A. Yes.

Q. During all of the time that the Actons lived on this property, did you pay for the utilities?

A. Yes.

Q. And what did those utilities come to on the average for the month during the time that they lived there?

A. I don't know how much now. I would say a minimum of fifteen and a maximum of twenty, or something like that.

Q. It varied from month to month?

A. Yes. That was water, light and gas.

Q. Now, after you had this conversation did you at any [34] time report this matter to the rent director or housing expediter in this area?

A. Well, yes, I immediately called up in Pasadena and reported it, and when the man came to the house——

Q. Well, you answered the question. You said you reported it.

A. I figured that they had this on there, naturally, because I went up there——

Q. Just a moment. You said immediately after

(Testimony of Virginia Boyd Binger.)

you had this conversation with Mrs. Acton you reported the terms to the area rent director?

A. I went over to Pasadena.

Q. What did you do there?

A. Listed the place.

Q. You filed a listing there? A. Yes.

Q. For how much rent?

A. \$25.00 a week, \$12.50 each room, the front room—I filed two of them, one for the front room and one for the back room, and I filed them at \$12.50 a week, and I named the tenant.

Q. The Plaintiff's Exhibit No. 2 refers to the front sleeping room listed in the name of James Acton and wife at \$12.50 per week commencing April 1, 1947. Is that the way you reported it over there? You nodded your head. You [35] have to speak up so the reporter can put it in the record.

A. Yes.

Q. At the same time you filed a registration in the name of Joe Morris? A. Yes, I did.

Q. That was for the back sleeping room?

A. Yes, it was.

Q. That was at the same rate, \$12.50 per week commencing April 1st, 1947? A. Yes, it was.

Q. And on each of those listings did you list the services that were to be given in connection with the use of those sleeping rooms?

A. Yes, I did.

Q. And those services included furnishings in the house. Was the house completely furnished?

(Testimony of Virginia Boyd Binger.)

A. Yes, it was, all except linens.

Q. Except linens. The bedrooms were furnished with beds and dressers? A. Yes, sir.

Q. The living-room had the usual living-room furniture in it? A. Yes, sir.

Q. The kitchen was completely furnished, was it, including a refrigerator? [36]

A. Refrigerator and stove, yes, sir.

Q. Now, after you filed these listings or these requests for registration, did you get any report or any statement from the rental director of this area as to whether or not your registration for \$12.50 per week for each room with the facilities that you have listed was granted?

A. Yes, I did. It wasn't.

Q. What did the rent director do about that?

A. He changed it to \$9.50 for one or \$3.00 for another in each room. \$9.50 for one party in a room and \$3.00 for additional, which made it \$12.50, the same as I had it.

Q. In other words, under the rent ceiling fixed by the rent director you were only entitled to charge \$12.50 per room if it was occupied by two people?

Mr. Scheir: I will object, your Honor. The registration statements speak for themselves.

The Court: I think that is what she understood it to mean, according to her testimony.

Mr. Bratter: I might say, your Honor——

The Court: Go ahead. I have ruled. No use arguing.

(Testimony of Virginia Boyd Binger.)

Q. (By Mr. Bratter): So that from that time Mr. and Mrs. Acton paid \$12.50 per month, is that correct?

A. They usually paid \$25.00 every two weeks.

Q. \$25.00 every two weeks and Mr. Morris paid \$25.00 for every two-weeks occupancy of his room? [37]

A. That is right.

Q. Do you still own that property?

A. No, I don't. I had to sell it.

Q. How long since you have owned this property? To refresh your recollection, was it May 17th, 1948?

A. I think I sold it—let me see. July, 1948, I think, 1948 I sold it—yes, July, 1948.

Q. And you do not now own the property and have not owned it then since July of 1948?

A. No, I have not.

Q. Now, a moment ago you testified concerning your reasons for wanting to reserve one room and privileges of the house in the event you had to move there.

A. Yes.

Q. Did that have to do with the eviction that was being threatened at your place in Los Angeles where you were renting?

A. Absolutely. I felt that place is in my name and I didn't know that I would have a place to take my baby. I didn't intend to go out and make it my residence, but I wanted a place to go.

Q. In March, 1947, when you had your negotiations for rental with Mrs. Acton and Joe Morris,

(Testimony of Virginia Boyd Binger.)

were you then being threatened with eviction in that place? A. Yes, sir. [38]

Q. I don't know whether I asked you, but at the risk of repetition, did you then receive the rent from Mrs. Acton to March 27, 1948, or March 28, 1948, at the rate you have given us and from Joe Morris at the rate you have given us, up until they no longer were your tenants? Is that correct?

A. Yes, sir.

Q. Was this 1947? A. 1947, yes, sir.

Q. Do you have anything further?

A. No, but except that I have never any intention—that is of the O.P.A., I never made that statement.

Q. When you were collecting the rent from Mrs. Acton and from Joe Morris after you had made a registration with the office of the rent director and after you had received the decisions from them, were you receiving it in accordance with the order of the rent director?

Mr. Scheir: I will object to that, your Honor. The orders will speak for themselves.

The Court: Sustained.

Q. (By Mr. Bratter): And did you continue to charge rent at the rates you have mentioned, believing that you had a right to do so under the order made by the director of rents in this area?

Mr. Scheir: I will also object, your Honor, that whether or not this defendant knew that she was overcharging is [39] immaterial, inasmuch as this

(Testimony of Virginia Boyd Binger.)

is an action for restitution and not for treble damages.

The Court: Sustained.

Mr. Bratter: No further questions.

Cross-Examination

By Mr. Scheir:

Q. Mrs. Binger, do you own any property now?

A. No, I don't.

Q. Do you manage any property now?

A. What do you mean, manage?

Q. Do you manage or operate any property now? A. I lease a house, yes.

Q. You lease a house?

A. I rent a house, yes.

Q. When you rented this property to Mrs. Acton you knew that at that time the maximum rent was \$40 a month for the entire house, didn't you?

A. I had no idea that that \$40.00 a month would be after the house was completed, I had no idea whatsoever.

Q. On January 24, 1945, you filed a registration statement?

A. I had nothing to do with the house in 1945. Mr. Binger was the owner. Although I might have been his wife, I had nothing to do with it. [40]

Q. I show you the original registration statement, a photostatic copy of which is now in evidence as Plaintiff's Exhibit No. 1, and ask whether

(Testimony of Virginia Boyd Binger.)

the signature appearing on the bottom thereof is yours.

A. As I said, Mr. Binger——

Q. Is that your signature?

A. Yes, but I didn't rent the house. He rented the house.

Q. That is your signature?

A. It certainly is, but——

Mr. Bratter: Mrs. Binger, if you will just listen to the question.

The Witness: Victor A. Binger, I explained before——

The Court: You answer his question.

Q. (By Mr. Scheir): You say that at the time you registered this house, filed your registration statement, your house was not completed?

A. No, it was not anywhere near completed.

Q. Is there anything appearing on this registration statement showing that this house is registered on an unfinished basis?

A. What do you mean?

Q. When you filed your registration statement, you did not say to the Office of Price Administration at that time that you were registering the place on an unfinished [41] basis?

A. I told them it was as is.

Q. You signed this registration statement saying that the place was rented in August of 1942, at \$40.00 per month, is that correct?

A. Yes.

(Testimony of Virginia Boyd Binger.)

Q. So when you say the house was unfinished you don't mean that it was uninhabitable, do you?

A. We were living in it while we were building it, and that is the way they were living in it.

Q. Mrs. Binger, you have never filed a petition for increase of rent with the Office of the Housing Expediter or the Office of Price Administration, have you?

A. No, that is why I had the O.P.A. come up there.

Q. You have never filed an application for an increase?

A. I don't know how to file petitions for those things. I have never had to do that, and I thought the O.P.O. knew that when I listed and called them.

Q. Mrs. Binger, during the time that the Actons and Joe Morris lived at 9715 Sunland Boulevard, did you ever occupy any part of that house?

A. Well, of course not. I still wanted a place to occupy in case I had to give up my house.

Q. You never did go over there?

A. I said that, however, that is what I wanted, protection [42] for my son.

Q. Mrs. Binger, I show you the original of the registration statement registering the front sleeping room and the original registering the back sleeping room at 9715 Sunland Boulevard, and ask if those are your signatures appearing thereon.

A. Yes.

Q. Mrs. Binger, I show you form 8-R-LA-283,

(Testimony of Virginia Boyd Binger.)

attached to this registration statement, and ask you if the signature appearing thereon is yours. Is that your signature? Is that your signature?

A. Yes, but I want to read it. Yes.

Q. Are those your signatures? A. Yes.

Q. I call your attention to a notation on each one of those forms 8-R-LA-283 "Landlord spends week-ends at this address. Tenant has use of house," and ask you whether you wrote that on there.

A. Yes, I did, so I could stay there if I wanted to.

Q. When you filed this registration statement you represented in our office that you spent your week-ends in the house, is that correct?

A. I had been before I rented it.

Q. From the time you rented the premises you never occupied any part of that house? [43]

A. No, I never had to.

Q. These papers were filed with our office after the Actons and Joe Morris moved in, is that correct? A. Yes, they were.

Mr. Bratter: No objection.

Mr. Scheir: I offer these in evidence, your Honor, as Plaintiff's Exhibits No. 8 and No. 9.

The Court: Admitted.

Mr. Scheir: And ask permission to withdraw the same upon substituting photostatic copies.

The Court: Very well.

(Testimony of Virginia Boyd Binger.)

(The documents referred to were marked Plaintiff's Exhibits 8 and 9, and were received in evidence.)

Q. (By Mr. Scheir): Mrs. Binger, you said that the dining-room was closed off from the rest of the house. Isn't it true that there was an archway leading from the dining-room?

A. I said that there was an archway into the living-room.

Q. That was not closed off?

A. It was not. The bedrooms were closed off from the dining-room.

Q. You further testified that there was a closet used in connection with the dining-room. Where was this closet located?

A. Between the kitchen and the hall. [44]

Q. Was it located in the dining-room?

A. No, it was between the kitchen and the hall. It was a dressing-room and it had a built-in drawers and a mirror and we used it when we lived there, as a closet for the dining-room, because I rented the rooms while I was out there.

Q. You further testified that you furnished no linens to the Actons for those rooms?

A. No, I didn't.

Q. Mrs. Binger, do you have any eviction notices that were served upon you when you occupied this other place that you said you feared you would lose?

A. No, I don't.

(Testimony of Virginia Boyd Binger.)

Mr. Scheir: I have no further questions, your Honor.

Mr. Bratter: Just a couple more questions.

Redirect Examination

By Mr. Bratter:

Q. At the time that the premises, this property was registered in 1945, when the property was supposed to be unfinished—— A. Yes.

Q. Was there an investigator of the O.P.A. rental office who came out to see the property?

A. I don't remember, Mr. Bratter. I didn't see him at the time. [45]

Q. After you registered this front bedroom and rear bedroom as being rented to Mr. and Mrs. Acton and Joe Morris, did an investigator of the O.P.A. come out?

A. Yes, there was one out there and I met him out there and explained to him about it and how I was renting it myself.

Q. Did you have any conversation with him concerning the relationship between Mr. and Mrs. Acton and Joe Morris, as to whether or not they were related? A. I don't remember.

Q. Did you say anything in the conversation you had with them as to whether or not Joe Morris was the son of Mrs. Acton by a prior marriage?

A. I don't remember any. I did explain to him in the course of the conversation that when it was rented before it was unfinished, and that I wanted

(Testimony of Virginia Boyd Binger.)

to re-rent it, and that I was re-renting it as rooms.

Q. You were asked by Mr. Scheir concerning whether or not you received any eviction notices. I will ask you to state whether or not you were defendant in an action entitled Emil F. Gonzales, and others, v. Virginia Binger, in the Municipal Court of the City of Los Angeles, which was an eviction proceeding.

A. Yes, I was, but when he asked me I didn't think to mention that here. [46]

Q. And I will ask you to state whether or not you were in fact evicted from your place on Wilton Street in Los Angeles in the early part of 1948.

A. Yes, I was, but they started it a long time before that.

Q. That was the disposition, the final disposition of the proceeding? A. Yes.

Mr. Bratter: That is all.

Recross-Examination

By Mr. Scheir:

Q. You say you were evicted in the early part of 1948? A. Yes, sir, I was.

Q. After you were evicted you never occupied these premises at 9715 Sunland Avenue, did you?

A. Not then I didn't, no.

Q. When you rented these premises to Mrs. Acton, did you know that Joe Morris was her son?

A. Yes, she told me, I think, true. I didn't

(Testimony of Virginia Boyd Binger.)

know if he was. I took her to be honest at the time that she told me.

Mr. Scheir: I have no further questions, your Honor.

The Court: You are excused.

(Witness excused.) [47]

Mr. Bratter: Mrs. Smith.

EILEEN SMITH

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Eileen Smith.

Direct Examination

By Mr. Bratter:

Q. Where do you live?

A. 1850 North Bronson.

Q. In the city of Los Angeles? A. Yes.

Q. Are you acquainted with Mrs. Virginia Binger, the defendant in this action?

A. Yes.

Q. For how long a time have you known her?

A. Oh, I would say over a period of about 30 years.

Q. Do you recall being in her home in the latter part of March, 1947, when Mrs. Acton and Joe Morris came to her home? A. Yes.

(Testimony of Eileen Smith.)

Q. Did you hear the conversation that took place at that time? [48]

A. I heard some of it, yes, while she was explaining the property.

Q. Did the conversation deal with the rental of Mrs. Binger's property out in Roscoe, California?

A. Yes, it did.

Q. Will you give us the substance of the conversation you heard between Mrs. Acton and Mrs. Binger and Joe Morris and Mrs. Binger?

A. Well, the fact that the property was to rent as furnished rooms.

Q. Yes. What, if anything, was said about the amount and the facilities they were to have?

A. Well, the bedrooms were to be rented with housekeeping privileges.

Q. And what was said about the amount of rent?

A. That was, as I recall, around \$25.00 a week for the rooms.

Q. For the two rooms?

A. No, for each room with the housekeeping privileges.

Q. Well, can you give any more of the conversation? Was there a conversation with respect to the whole house or each room or what?

A. No, my understanding of it was that Mrs. Acton was renting the room for herself and her husband.

Q. And what about Joe Morris? Was anything said about [49] his renting a room?

(Testimony of Eileen Smith.)

A. Not at that particular place, other than he might be needing a place to stay.

Q. Yes.

A. I think there was nothing definite said about the Sunland property.

Q. And was the arrangement with reference to a room that Mr. and Mrs. Acton were to rent also applicable to the room which Joe Morris was to rent from Mrs. Binger? A. No.

Mr. Scheir: If the court please, I object to these questions. They are leading questions.

The Court: He is asking what was said. Overruled. Go ahead.

Q. (By Mr. Bratter): You just tell us, as best you can remember.

A. Well, I just can't remember the words they had. I don't think anything was said about the Morriszes renting a room there.

Q. Were you with Mrs. Binger at the time that she went out to her property shortly after the day this conversation took place?

A. I was out there with her, I think, just about every time she went out during that period of time, yes.

Q. Were you there at the time the investigator from the [50] rent director's office was there?

A. Yes.

Q. You saw him inspect the property?

A. Yes.

Q. Were you present and did you participate

(Testimony of Eileen Smith.)

in the conversation that took place between him and Mrs. Binger?

A. No. I was there, I mean, I saw them talking.

Mr. Bratter: That is all.

Cross-Examination

By Mr. Scheir:

Q. Mrs. Smith, you say you were present when these negotiations were had between Mrs. Binger and Mr. and Mrs. Acton?

A. I was in and out of the room, yes.

Q. You were not there all the time, were you?

A. No.

Q. What time of the day was it?

A. Well, let me see if I recall that now. Usually we were back at the place on Wilton in the latter part of the afternoon.

Q. Do you recall what day it was that this conversation took place?

A. No, I really couldn't recall the day it was.

Q. Is it your testimony, Mrs. Smith, that you were not [51] present during the entire transaction? Is that correct?

A. I wasn't there during the entire transaction, but I was there in her home and knew what the transaction was, that she was renting furnished rooms at that property.

Q. Did you hear the entire transaction?

A. I didn't hear the entire transaction, no.

Mr. Scheir: No further questions, your Honor.

Mr. Bratter: No further questions. Defendant rests.

(Witness excused.)

(Whereupon the defendants rested their case.)

Mr. Scheir: I will call Mrs. Acton in rebuttal.

LILLIAN M. ACTON

recalled as a witness by and on behalf of the plaintiff, having been previously sworn, was examined and testified, in rebuttal, as follows:

Direct Examination

By. Mr. Scheir:

Q. Mrs. Acton, have you ever seen Mrs. Smith before today?

A. Not to my knowledge.

Q. Has she ever come to your house with Mrs. Binger, when Mrs. Binger has been there?

A. No, sir, she has not. [52]

Mr. Scheir: No further questions, your Honor.

Mr. Bratter: No questions.

(Witness excused.)

Mr. Scheir: Nothing further.

The Court: Proceed with the argument.

ARGUMENT ON BEHALF OF PLAINTIFF

By Mr. Scheir:

If the court please, the issue here appears to be as to how these accommodations were rented by Mrs. Binger to Mrs. Acton, inasmuch as we have

two maximum rents, one based on a rental for the entire house and one based on room rental. Now, in connection with the filing of the registration statement for the room rentals, I would like to call the court's attention to the fact that those registration statements are stamped on the face "Maximum rent subject to examination and review." I would further like to point out to the court that the one for the front sleeping room has the name James Acton and wife and the one for the back sleeping room has the name Joe Morris. Further, the statement attached to the registration statement, filed at the same time, stated in the landlord's own handwriting that she was occupying the accommodations during week-ends.

It is on that information, your Honor, the area rent office accepted these registration statements and issued [53] orders. We had no way of knowing at the time that Mrs. Binger would not be occupying the accommodations. We had no way of knowing that Joe Morris was the son of Mr. and Mrs. James Acton, inasmuch as it was a different name. I will admit, your Honor, that the evidence is conflicting as to the manner in which these premises were rented, but I think the most important factor is this: These four people who occupied this house comprised the same family, one family. Were we to permit rentals to be made to members of the same family on a room basis, we should have no rent control. It is highly inconceivable that one family in a free rental market

would agree to rent individual rooms, inasmuch as the custom as long as we can remember was for one family to rent an entire unit, and use it as an entire unit, and that was the case here. The entire house was used by each person who dwelt there. The cooking was done in the kitchen for the entire family. The entire family ate at the same table. We don't have here the situation that exists in a rooming house. We have here the situation that exists where one family rents the entire dwelling.

Now, in that connection, your Honor, I have a case in the United States Court of Appeals for the Fourth Circuit, No. 5941, Tighe Woods, Housing Expediter, v. Joseph Machen, decided December 19, 1949, not yet reported. And that case, your Honor, deals with a situation of this kind, where we [54] had a registration statement establishing the maximum rent for the entire house, and then a registration statement for portions. The upper court held in reversing the District Court that the registration statement merely informs the Expediter of the present status of the property and does not establish the maximum rent. Circuit Judge McGruder said in *Kalwar vs. McKinnon*, at Page 264, that was not a rental which had been established by the rules and regulations under 1388.284 where the rental amount is the rental received March, 1942, where nothing has been changed and the administrator has made no order fixing the maximum rent, in that particular instance at \$47.50, nor has he made any order under Section 1388.285

changing the maximum rent from that provided by Section 1388.284. If the landlord sets forth in the registration statement certain facts which are incorrect, he does not thereby establish a maximum legal rent at the asserted figure.

To make this clear the Administrator has caused to be stamped on the face of the registration statement "Maximum rent subject to examination and review," and when that examination and review is gone into we are apprised of the true facts. When these registration statements for the front sleeping-room and back sleeping-room were filed with our office we were not apprised of the true facts, inasmuch as we didn't know how the house had been rented, we didn't [55] know that Joe Morris was a member of Mrs. Acton's immediate family, and we didn't know that Mrs. Binger was not living at the premises during the week-ends, as she said in the Exhibits, I believe it is, 7 and 8.

The Court goes on to say furthermore that on December 1, 1942, the Price Administrator issued an interpretation, OPA Schedule 200:1222, stating that a dwelling rented on the maximum rent date for a specified amount, and subsequently subdivided into units, must revert to the original rent when the unit is re-rented as originally registered.

Bowles v. Mannie & Co., 155 Fed. (2d) 129; *Porter v Crawford and Doherty Foundry Co.*, 154 Fed. (2d) 431.

I have an opinion here in the Machen case, your Honor, to which I would like to refer. The build-

ing contained a first floor apartment consisting of four rooms, which was originally registered under the regulation on August 3, 1942, at a rental of \$45.00 per month, and thereafter rented to one tenant for \$45.00 per month. During 1946 the landlord altered the premises by changing the same from one unit into two units. On June 30 of that year the front apartment was registered for \$25.00 per month and the rear apartment was registered for \$35.00 per month. Those registrations of the landlord were duly filed with the local representative of the Housing Expediter and the two new apartments were then rented to two separate tenants at the rates just mentioned. On September 8, 1947, the landlord rented the two units comprising the entire first floor to a single tenant at the rate of \$60.00 per month, or the aggregate of the amounts paid by the two previous tenants. The Housing Expediter claimed that under the controlled housing rent regulation the maximum rent for the whole first floor apartment was frozen at \$45.00 per month and brought this suit for an injunction and for restitution of the rental payments in excess of the rent in existence on the freeze date. The court found the evidence shows that no major alterations were made in 1946 when the apartment was subdivided into two units and rented to two separate tenants, or at any time thereafter. The two units together comprised exactly the same space as the original single unit, and there was only one bathroom and one kitchen for the two

units. In that case the judgment of the District Court was reversed and relief prayed for in the complaint was ordered granted.

Under the facts in this case, in view of the law stated in that case, we believe that this property was rented to this family as an entire unit; it was used by them as an entire unit; that Mr. Binger misrepresented when she filed these individual registration statements; that inasmuch as we did not have the true information, our examination and review, if such there were, was based on this, and therefore [57] the maximum rent permissible is \$40.00 per month, when rented for an entire family, and that the judgment should be entered in favor of the plaintiff.

The Court: I am not saying yet what the evidence shows. The defendant in this case has testified that while the maximum rent was fixed at \$25.00 a month, yet she furnished certain utilities without cost to the tenant.

Mr. Scheir: That is true, your Honor.

The Court: You see, if she was to collect that, the minimum amount would be \$15.00 up to \$40.00. That has not been disputed, in addition to the rent fixed, and that was inside of the \$25.00, so she testifies here, and I have not heard any evidence to dispute in any way that she furnished in addition to that certain utilities which amounted to about \$13.00 a month more than that. If this tenant had rented for \$40.00 a month, we will have to add that cost.

Mr. Scheir: If your Honor will recall, the defendant in her testimony stated that it was a minimum, and in that connection I would like to cite——

The Court: She said that was the understanding between them.

Mr. Scheir: Regardless of the understanding between the parties, your Honor, any services that she may have furnished [58] in connection with the use of the housing accommodation becomes moot when we weigh the matter under the regulations.

The Court: Sure.

Mr. Scheir: In other words, the landlord cannot put in a new refrigerator and say, "I will charge you \$5.00 per month more." He must come in and petition for an increase. That is what the judge said where they put in a pair of curtains and charged \$2.00 more per month. So if the court wishes these other citations, I can certainly present them.

The Court: No, I didn't make any ruling. I will hear from the defendant, what he has to present.

Mr. Scheir: Thank you, your Honor.

ARGUMENT ON BEHALF OF DEFENDANTS

By Mr. Bratter:

Your Honor, this is not the ordinary rent case where the landlord charges excessive rents and

then a complaint is filed against him. This is a case where the landlord went to the government and gave them the facts she had at hand and went and filed a registration that way, and the exhibits here show that the rent director made a decision and fixed the rent ceiling at \$25.00 a week for the two rooms or \$12.50 per week if occupied by one occupant. So that we do not have the matter referred to by counsel in those cases he has cited that are based merely upon a registration, the [59] registration merely stating that the landlord has filed a statement, we have the landlord not only filing her statement, but we have a decision fixing the minimum at \$12.50 per week for each room if occupied by two persons.

So we have here at least an opportunity given the government to find out the facts, and the decision of the rent director was based upon hearings, notice was served upon all parties, and all parties had a right to come in and be heard before that decision, and finally the decision came forward on June 18, 1947, according to the exhibits we have here in evidence.

Now, the contention is made in the government's testimony that Joe Morris was a member of Mrs. Acton's family. There is nothing in the evidence here to dispute that contention of the government and there is no evidence that he did not have that connection.

The Court: There is testimony here that the

charge was \$40.00 instead of \$25.00. What is your answer to that?

Mr. Bratter: My answer to that is, your Honor, that that was the rent ceiling before these people became tenants and before the rent director made a new ceiling; that when he issued the orders in 1947 he established a new ceiling covering the situation here involved.

The Court: \$25.00 after that and \$40.00 before?

Mr. Bratter: Yes. [60]

The Court: Then he reduced it from 40 to 25.

Mr. Bratter: No, the 25 was at the rate of \$12.50 per room for two rooms per week.

The Court: Per week?

Mr. Bratter: Yes. Before that it was monthly, and then it was \$12.50 each week for two rooms.

The Court: Where did this \$40.00 rent come in?

Mr. Bratter: In 1945 when it was just an unfinished place, the ceiling was established at \$40.00 per month.

The Court: Then it was raised to \$25.00 a week for the two rooms, that is your contention?

Mr. Bratter: That is the situation we have now, and the government says that is all true, but because Joe Morris happened to be related to Mrs. Acton that this is an entirely different situation, and we must have rented it to Mrs. Acton's family. I say it is a matter purely between the Actons and Joe Morris. They had understood at the time that they were renting two rooms with house privileges, and that if Mrs. Binger had the right to come in

and use part of the facilities, there is no evidence that she was denied the right at any time, there is no evidence here that she concealed any information from the government, so that the most that could be said is that the government, because it had or appeared to have a technicality here—that we are not to be blamed if Joe Morris' name is not the same as Mr. and [61] Mrs. Acton's. I say all the information we had was certainly given the government, and more than that, after the registration was filed and after the decision of the government fixing the rent ceiling, an investigator of the government came out and inspected the building, and a change was made in this order. That is, I feel, an element that ought to be considered in connection with the government's contention that the relation was concealed, and they had the opportunity to determine that relationship. It is our position that not only were these new accommodations with a different tenant, but that it was the first renting, and that the rent was determined as \$12.50 a week, \$12.50 for each room and she paid the utilities that cost \$15.00 to \$20.00 a month.

The Court: Then in general is it your position that they did not take that into consideration, that is, the Expeditor's Officer, as to the services rendered and did not give the landlord credit for the cost to her?

Mr. Bratter: The reason for that assumption we think is this:

The Court: Get it right down to that point.

Mr. Bratter: We say that at the time the landlord went to the rent director and got these rulings, at the time that she did that she was not really applying for an increase, but that she went to the rent director and said, "We are renting the bedrooms together with the house facilities, and I am [62] giving these additional facilities, more than we gave before, and we want you to fix a rent ceiling on these rooms," which he did, and I say when he did that, that the \$40.00 a month was out of the picture and a new ceiling was fixed on the property.

The Court: And he increased it to \$25.00, you say, for the two rooms?

Mr. Bratter: That is correct.

The Court: And that is what you told the tenants about it?

Mr. Bratter: That is right, and the government is trying to make us make restitution for the full rate that was paid and that was collected, and not even give us credit for the utilities that averaged out from \$12.00 to \$20.00 a month. I think that all these matters weigh very strong for this defendant, and the court should take all these matters into consideration.

FURTHER ARGUMENT ON BEHALF OF PLAINTIFF

By Mr. Scheir:

Your Honor, the counsel for the defendant is attempting to show that we have been very, very

arbitrary about this defendant. Commonly where additional facilities and services are rendered and the landlord comes in with a petition for an increase, he is allowed that, but in this case, as in so [63] many other cases, the defendants have not filed this petition for increase in order to permit this rental to be determined on the additional.

The Court: Well, the courts have held that you have to deal in good faith. They have held it is the rule of these courts that you have to petition for the order.

Mr. Scheir: That is well-established law, your Honor.

The Court: Yes, that is the way they are holding.

Mr. Scheir: Now, I would like further to point out, as was held in those cases I cited to the court, the fact that the defendant filed another registration statement does not change the maximum rent. The maximum rent for the entire unit remains at \$40.00 per month. I contend that the information given to us by the defendant in these two additional registration statements and in the statements attached to the registration statements were not true, when it puts us under the impression that two bedrooms had been rented to these people unrelated and that Mrs. Binger was retaining the balance of the house. The testimony here of Mrs. Binger herself was to the effect that at the time she filed this statement she had not been living there in the six months period and that at no time

during the occupancy of the Actons did Mrs. Binger occupy any portion of that property. Therefore it is our contention that this house was rented in its entirety to the Actons as a family unit, and as such it was [64] used by them, and that the maximum rent of \$40.00 per month should apply.

Mr. Bratter: We are willing to submit our case, your Honor, completely on the order issued by the rent director fixing the rent for this property at \$12.50 per week for each of the rooms, not merely registration, but the order issued by the rent director.

The Court: That would be \$25.00 a week for the two rooms.

Mr. Bratter: Yes.

The Court: And that the government contends should be \$40.00.

Mr. Scheir: \$40.00 per month, your Honor, yes, as against \$25.00 per week.

Mr. Bratter: That was the 1945 ceiling. Then when certain improvements had been made by these people and they were paying the utilities, we asked that it be fixed at \$12.50 per room for each room, and the Expediter fixed it then at that.

The Court: When?

Mr. Bratter: In 1947.

The Court: In 1947 he fixed it at \$40.00.

Mr. Bratter: Yes, \$12.50 per room per week.

The Court: That is \$25.00 a week. Prior to that it was \$40.00 a month, you say? [65]

Mr. Bratter: That is right.

The Court: What caused him to raise it?

Mr. Bratter: Well, the tremendous improvements which were made on this property. The witness testified that she spent about \$3,000 on the property, besides paying the utilities on the house.

Mr. Scheir: I would like to clarify that point, your Honor. Those matters were not raised on the basis of any—there has been no petition filed for adjustment. This landlord filed two registration statements stating that she was renting the two individual rooms. It is our contention that she rented the entire house. Furthermore, she stated that she herself was retaining a portion of the property and was occupying a portion of it. Under those circumstances, your Honor, the landlord retaining a portion of the house would be entitled to rent individual rooms, and from the information given to us by this defendant the agency would have no opportunity to know that this information was not true.

Mrs. Binger herself testified that she did not retain any portion of the property, and inasmuch as she did not occupy any portion of it, either seasonally or on any basis, it is our contention that the tenant occupied the entire house and therefore the \$40.00 per month should stand.

Mr. Bratter: Your Honor, on that matter the defendant [66] testified definitely herself that she was reserving the dining-room for a sleeping place for herself in the event she should need it.

The Court: In this answer to the complaint she said the amount of rent was \$25.00 per week.

Mr. Bratter: That is for the two bedrooms.

The Court: That is for two bedrooms, but the maximum rent is \$40.00 a month.

Mr. Bratter: Their pleadings, your Honor, discloses that a later maximum was fixed in 1947. All the facts are contained in the pleading, your Honor.

The Court: \$25.00 a week, that is a hundred dollars a month. The rent was fixed at \$40.00 a month. That would be \$60.00 more they raised it a month, wouldn't it? Does that figure out the \$950? Have you figured it out?

Mr. Scheir: That is correct, your Honor.

The Court: It is the difference between \$40.00 and a hundred dollars a month.

Mr. Scheir: That is true.

The Court: The \$25.00 was fixed at the period that you are setting up here. They occupied the entire house?

Mr. Scheir: It is our contention, your Honor, from the facts shown that they did.

The Court: One of these rooms was occupied by a son?

Mr. Scheir: And those rooms were occupied with a son [67] sleeping in one room and Mr. and Mrs. Acton sleeping in the other room, and they used the entire house, each member of the family had the right to use the entire house.

The Court: That is the testimony. Do the receipts disclose that?

Mr. Bratter: Yes, the receipts run both to Mr. Morris and Mrs. Acton. They are separate receipts,

two weeks and a week, respectively. Mr. Morris was not dependent on the mother. He was 23 years old at the time, and he had been with the Flying Tigers.

The Court: He was a son, wasn't he?

Mr. Bratter: Yes, but the mere fact that he was a son by a prior marriage does not necessarily make him a member of the same family.

The Court: Well, how were they living there together? That is the question I have got to solve. How were they living there together?

Mr. Bratter: If Joe Morris had been John Smith, who was not related to the Actons, there wouldn't be any question, because their whole claim turns on the fact that Joe Morris was a son, therefore they say that fact in itself changes the basis to one family using it. That is a pretty narrow thread, I think, for distinguishing. There is no law, the rent regulation or rent law itself does not say that because Joe Morris happened to be a son by a prior marriage, that that [68] would knock out our rent regulation and that we would not have the right to rent out that room. If the government was dissatisfied with the report we were making, and we disclosed to the government that we were renting to Joe Morris and Mrs. Acton and her husband, then they should not have made this regulation that fixed the rent ceiling themselves.

Mr. Scheir: The rent regulation does prohibit evasive practices, your Honor, and it is an evasive practice in which a family is forced to rent in-

dividual rooms whereas we know that a family unit occupies the entire house and uses the entire house, and this is merely a device to evade the maximum rent of \$40.00 per month.

The Court: The amount of rent paid and charged here to be \$25.00 a week for the two occupying one room and two who occupied the other room, which would be \$100.00 a month, and the maximum is fixed at \$40.00 per month. There is \$60.00 a month difference between the hundred dollars and \$40.00. The Expediter raised the rent, then, from \$40.00 a month to \$25.00 a week. Does that check with those receipts? Call my attention to those receipts again. Are they \$25.00 a month or a week?

Mr. Scheir: They are \$25.00 per week, your Honor, as against the maximum rent of \$40.00, which as I say is the maximum rent, the receipts are each made for \$25.00 for two weeks for each room. There is a separate receipt for [69] each room.

The Court: That runs about a hundred dollars a month, doesn't it?

Mr. Scheir: A little more than a hundred dollars a month.

The Court: That is the amount you said they paid. That maximum rent was fixed at \$40.00 per month, and it wound up at the rate of \$25.00 a week.

Mr. Scheir: We contend, your Honor, that the \$40.00 per month maximum rent still exists for

that house. That language is peculiar in there. We have a good claim for the excess.

Mr. Bratter: We contend that a new ceiling was fixed at \$12.50 per week, your Honor. I would like to clarify. When there was a new ceiling fixed, there is a maximum rent for the entire house and there is a maximum rent for individual rooms, so under the record facts themselves they have got that mixed up, that is the Expediter gets things mixed up in his office in fixing the rent, that is all.

Mr. Scheir: On that point, your Honor—

The Court: I am trying to find out when the change—when he changed this from \$40.00 and raised it to \$25.00 a week?

Mr. Bratter: The \$40.00 rent ceiling was made in 1945, your Honor. The \$12.50 per week rent ceiling was made in 1947, after this rental took place which is involved in this [70] action.

The Court: That would be a hundred dollars a month, then.

Mr. Bratter: Yes.

The Court: Prior to that it was \$40.00 per month, so he has raised it.

Mr. Bratter: That is right.

The Court: Yes, that is right, so it says here, that was the amount paid, \$25.00.

Mr. Bratter: The government made this complaint and made no representation whatsoever of the new ceiling, but ignored it entirely.

Mr. Scheir: Your Honor—

Mr. Bratter: And in the questionnaire which

was submitted by us for the pretrial we stated we were standing on the order of the rent director fixing the rent at \$12.50 per week per room, the order made by the rent director in 1947.

The Court: According to the statement attached to your complaint, you have a slip in the amount of rent paid and who paid it.

Mr. Scheir: The tenant, Mr. and Mrs. J. D. Acton.

The Court: You have got them credited with \$25.00 a week.

Mr. Scheir: That is correct.

The Court: And you said that the maximum rent was \$40.00 a month. [71]

Mr. Scheir: That is correct. We claim the tenant overpaid.

The Court: Oh, the tenant overpaid?

Mr. Scheir: Yes, the tenant overpaid. He was supposed to pay \$40.00 a month and paid \$25.00 a week.

The Court: There is \$60.00 a month difference.

Mr. Scheir: A little more than \$60.00, yes.

The Court: These receipts disclose what the charge was, you say?

Mr. Bratter: Prior to the time of these two later.

The Court: Reading one of them it says, "\$25.00 two rooms and kitchen privileges, Mr. and Mrs. James Acton, April 1st to April 8th, \$25.00." Another April 8th to April 22, \$25.00. That is two weeks. That is for the one room. That is more than \$40.00 a month.

Mr. Bratter: If the court please, I would like to call your Honor's attention to the fact that two receipts were issued at the same time, both dated the same day, each in the sum of \$25.00, and they cover a two-week period, in other words, \$50.00 were paid during the two-week period.

The Court: They paid \$25.00 a week there, but the maximum is fixed at \$40.00.

Mr. Bratter: And we say we charged that rent because we were allowed to by the order of the rent director fixing it at \$12.50 for each room, \$25.00 a week for the two rooms. [72]

The Court: Renting it individually, but there you have one family, and then two men occupied one room, one of them was on his own.

Mr. Scheir: Your Honor, both were sons of Mrs. Acton. One was eleven, I believe, and the other was twenty-three. There is no evidence here that there were two sons involved in this proceeding. The only evidence we have here is as to Mr. and Mrs. Acton and Joe Morris. That is the only evidence there is in this record, if your Honor please. Mrs. Acton testified that she, her husband, and her two sons, one aged eleven and the other aged twenty-three occupied this house, and all those lived there during the time they occupied it.

The Court: They all lived together and used the house together, she says, for all their purposes?

Mr. Scheir: That is correct.

The Court: Of course, that includes cooking and eating and bathing and all those things, they

all used together. It is a question of whether you can divide up the individual rooms that way and bring it under that.

Mr. Bratter: Your Honor, isn't this a case which is so close on the facts that I can see that it is giving the court considerable difficulty to determine just where the dividing line lies? I think unless a case is clear-cut, that the government should not be permitted to impose a [73] penalty on this defendant. I think the case is close enough so the parties ought to be left to rest where they are.

The Court: I will think it over until in the morning. You come down in the morning, and I will see if I can reach a conclusion. I want to think it over a little.

Mr. Scheir: Very well. Then the witnesses may be excused? They won't have to come tomorrow?

The Court: No, they won't have to be here tomorrow. The rule is that the burden is on the plaintiff to prove its case, the same as any other suit.

Mr. Scheir: Your Honor, we feel we have proved the case.

The Court: Of course, there is some conflict here between you, but the preponderance of evidence does rule in this case the same as any other civil suit where one endeavors to recover a civil judgment against another. If there is any difference between this and any other cases, as far as that is concerned, the general rule is applicable.

Mr. Scheir: May I point out to the court that

there is no contradiction of the use to which the property was put, and that it was used by the entire family. There is no controversy as to that, and that is our contention, your Honor. That is the best way to answer that.

The Court: The rent was paid by one member of the family?

Mr. Scheir: That is correct. [74]

Mr. Bratter: Well, let's see about that. The receipts are made out to Mr. and Mrs. Acton.

Mr. Scheir: The receipts, your Honor, were merely a means of evading the law.

The Court: I will recess until tomorrow morning at 10:00 o'clock.

(Whereupon, an adjournment was taken on Monday, January 30, 1950, until 10:00 o'clock a.m., Tuesday, January 31, 1950.) [75]

Tuesday, January 31, 1950, 10:00 A.M.

DECISION

The Court: Are the parties present on the case we tried yesterday?

Mr. Bratter: Yes, your Honor.

Mr. Scheir: Yes, your Honor.

The Court: Both are present. I have reached a conclusion in that case, and I find under the evidence that the defendant has complied with the regulations and the law in getting an increase in rent for this house; that the son occupied one bedroom and the Actons the other.

I find that they tried for and got that increase from the Expediter, allowing the amount they charged, \$25.00. I do not decide the case on the question of equity, or any of those things. That is for the Expediter. But under the regular proceeding the defendant went to and got this increase covering this period of time, and was allowed to charge the \$25.00, which she did, and which she gave a receipt for, and the judgment will be in favor of the defendant. You may draw a decree and findings holding that.

Mr. Bratter: Very well, your Honor. [77]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of April, A.D. 1950.

/s/ MARIE G. ZELLNER,

/s/ E. L. DRUMMOND,

Official Reporters.

[Endorsed]: Filed April 12, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 32, inclusive, contain the original Complaint for Restitution and Injunction; Answer; Request for Admissions Under Rule 36 Federal Rules of Civil Procedure; Admissions Requested Under Rule 36 filed April 22, 1949 and May 2, 1949; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal, Statement of Points on Appeal and Designation of Record on Appeal which, together with original plaintiff's exhibits 1 to 9, inclusive, and the original reporter's transcript of proceedings on January 30 and 31, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 17th day of April, A.D. 1950.

EDMUND L. SMITH,
Clerk,

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12525. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. Virginia Binger, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 19, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12525

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

VIRGINIA BINGER, DOES I TO X,

Defendants.

STATEMENT OF POINTS ON APPEAL

The following are the points upon which Appellant intends to rely upon the appeal:

1. The lower Court erred in holding that the maximum rent for the housing accommodations was \$25.00 per week, the aggregate of the maximum

rents for two sleeping rooms, and not the sum of \$40.00 per month, the maximum rent for the entire unit.

2. The lower Court erred in holding that the violations alleged in the Complaint were not established and in refusing to grant judgment in favor of the plaintiff as prayed for in the Complaint.

ED DUPREE,
General Counsel.

LEON J. LIBEU,
Assistant General Counsel.

BENJAMIN FREIDSON,
Special Litigation Attorney, Office of the Housing
Expediter, Washington 25, D. C.

Dated this 25th day of April, 1950.

Proof of Service attached.

[Endorsed]: Filed April 28, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

Pursuant to subdivision 6 of Rule 19 of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, hereby designates for inclusion in the Record on Appeal:

1. Complaint filed February 4, 1949.
2. Answer filed March 1, 1949.
3. Plaintiff's Request for Admissions Pursuant to Rule 36, filed April 11, 1949.
4. Admissions Requested Pursuant to Rule 36, filed April 22, 1949.
5. Admissions Requested Under Rule 36, filed May 2, 1949.
6. Findings of Fact and Conclusions of Law by the Court, filed February 13, 1950.
7. Judgment of the Court entered February 14, 1950, in Civil Order Book No. 63, Page 767.
8. Entire Reporter's Transcript of all testimony and proceedings at the trial.
9. All exhibits.
10. Notice of Appeal dated March 31, 1950.
11. Statement of Points upon which Appellant Intends to Rely on Appeal.

11. Clerk's certificate.

12. This Designation.

ED DUPREE,
General Counsel.

LEON J. LIBEU,
Assistant General Counsel.

BENJAMIN FREIDSON,

Special Litigation Attorney, Office of the Housing
Expediter, Washington 25, D. C.

Dated this 25th day of April, 1950.

Proof of Service attached.

[Endorsed]: Filed April 28, 1950.

No. 12527

United States
Court of Appeals

For the Ninth Circuit.

See Vol 96 37

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION and INTER-
NATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

vs.

JUNEAU SPRUCE CORPORATION, a Corpo-
ration,

Appellee.

Transcript of Record

In Two Volumes

Volume I
(Pages 1 to 552)

FILED

Appeal from the District Court
for the Territory of Alaska
Division Number One.

JUL 10 1950

PAUL P. O'BRIEN,
CLERK

No. 12527

United States
Court of Appeals
For the Ninth Circuit.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION and INTER-
NATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

vs.

JUNEAU SPRUCE CORPORATION, a Corpo-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

GLADSTEIN, ANDERSEN, RESNER &
SAWYER,

240 Montgomery Street,
San Francisco, California.

HENRY RODEN and
WILLIAM L. PAUL, JR.,

Juneau, Alaska.
For Appellants.

N. C. BANFIELD of FAULKNER, BANFIELD
AND BOOCHEVER,

Juneau, Alaska.

MANLEY B. STRAYER of HART, SPENCER,
ROCKWOOD, McCULLOCK AND DAVIES,

1410 Yeon Bldg.,
Portland, Oregon,
For Appellees.

In the District Court for the Territory of Alaska
Division Number One at Juneau

No. 5996-A

JUNEAU SPRUCE CORPORATION, a Corporation,

Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, an Unincorporated Association, and INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16, an Unincorporated Association,

Defendants.

SECOND AMENDED COMPLAINT

Comes now plaintiff and for its cause of action against defendants alleges as follows:

I.

This action arises under the laws of the United States regulating commerce, more particularly under Section 303 of the Labor-Management Relations Act, 1947 (Act of June 23, 1947, c. 120 § 303, 61 Stat. 158, 29 U. S. C. A. (pocket supp.) § 187).

II.

Plaintiff is a corporation organized under the laws of the Territory of Alaska, with its principal place of business at Juneau, Alaska. Plaintiff has

paid to the Territory of Alaska its annual corporation taxes last due and has filed its annual report for the calendar year 1947, as required by the laws of said Territory.

III.

Defendant, International Longshoremen's and Warehousemen's Union, is and at all times herein mentioned was a labor organization, engaged in directing, representing, and acting for its members and local unions in the Territory of Alaska, in the Province of British Columbia, Dominion of Canada, and in various ports of the West Coast of the United States, to wit, in ports in the States of Washington, Oregon and California. [1*]

IV.

Defendant, International Longshoremen's and Warehousemen's Union, Local 16 (also sometimes designated as Local 1-16), hereinafter designated "Local 16" is and at all times herein mentioned was a labor organization chartered by and affiliated with the International Longshoremen's and Warehousemen's Union immediately hereinabove described in Paragraph III hereof, with its headquarters in the City of Juneau, Alaska, and is engaged in representing its members in and about said city.

V.

At all times herein mentioned plaintiff conducted and now conducts a lumber manufacturing opera-

* Page numbering appearing at bottom of page of original Transcript of Record.

tion which at all times material hereto operated as follows: Plaintiff maintains a logging operation at Edna Bay, Territory of Alaska, and transports its logs from said place to its mill at Juneau in said Territory, at which mill said logs are manufactured into lumber and lumber products. Plaintiff maintains retail lumber yards in the cities of Juneau, Anchorage and Fairbanks, in the Territory of Alaska, at which yards it sells a portion of the lumber manufactured at its mill, as well as hardware, sash, doors, shingles, and other items commonly sold at retail lumber yards, all of which items except its lumber are purchased in the United States and transported to said yards. Plaintiff sells the majority of the lumber and lumber products produced at its mill in Juneau to customers in many states of the United States, shipping said lumber and lumber products so sold to said customers by water to West Coast ports in the United States and Canada and from said ports by railroad to its customers located as aforesaid. That by virtue of its location plaintiff is unable to receive or ship products in the operation of its business as herein described except by water, in whole or in part. That the loading and unloading of its barges at its mill is an essential part of the manufacturing and sale of plaintiff's lumber and lumber products.

VI.

That a labor organization, to wit, International Woodworkers of America, Local M-271, hereinafter

designated "Local M-271," has at all times herein mentioned represented and now represents all of plaintiff's employees at its [2] mill and retail yard in Juneau, except plaintiff's clerical and supervisory employees, and plaintiff has at all times herein mentioned recognized and bargained with said Local M-271 as such representative; that there is now and has at all times herein mentioned been in effect a collective bargaining agreement between plaintiff and Local M-271 wherein plaintiff recognizes the right of Local M-271 to bargain for plaintiff's employees at its Juneau operations as described herein.

VII.

From about April 10, 1948, until the present time defendants have unlawfully engaged in, and induced and encouraged plaintiff's employees at Juneau, Alaska, and employees of other employers, to engage in a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities of plaintiff, or to perform any services for plaintiff.

VIII.

An object of defendants in their activities described in paragraph VII above has been, and is, to force and require plaintiff; to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons, including members of Local M-271, to whom said work has

heretofore been assigned. Neither of said defendants has been certified by the National Labor Relations Board as the bargaining representative for employees performing such work.

IX.

That as a direct and proximate result of the picketing and coercive statements of defendants, and of the communication of the fact of said picketing to other labor organizations in ports of the United States and Canada, and elsewhere, all of which activities have been since April 10, 1948, and now are continuously carried on, plaintiff's employees at its Juneau mill refused to work for a long period of time, to wit, from April 10, 1948, to approximately July 19, 1948, and plaintiff was forced to close said mill as a result thereof. That sufficient employees returned to work on or about July 19, 1948, to enable plaintiff to operate said mill for a period of time, to wit, until October 11, [3] 1948, but at greatly increased cost to plaintiff. That because of the activities of defendants aforesaid, plaintiff has been unable to ship its lumber from its mill to customers, and as a result thereof plaintiff again was forced to close its mill on October 11, 1948. That because of the activities of defendants aforesaid plaintiff has been and is unable to transport materials to its retail yards in Alaska as described in Paragraph V hereof. That as a direct and proximate result of the unlawful activities of defendants, as hereinabove described, plain-

tiff has been damaged in the amount of One Million Twenty-Five Thousand (\$1,025,000.00) Dollars to date of filing this second amended complaint.

X.

It has been necessary for plaintiff to employ attorneys for the institution, maintenance and prosecution of this action, and will incur fees for such services in a minimum reasonable amount of Ten Thousand (\$10,000.00) Dollars.

Wherefore, plaintiff demands judgment against defendants and each of them in the sum of One Million Twenty-Five Thousand (\$1,025,000.00) Dollars and the additional sum of Ten Thousand (\$10,000.00) Dollars as attorneys' fees, and for its costs and disbursements herein.

N. C. BANFIELD,

Attorney for Plaintiff.

Copy received 4/27/49.

[Endorsed]: Filed April 27, 1949. [4]

[Title of District Court and Cause.]

SPECIAL APPEARANCE BY MOTION
TO QUASH SERVICE OF SUMMONS

Comes now International Longshoremen's and Warehousemen's Union, and appearing specially for the purposes herein set forth and for none other, moves that the service of summons on movant herein be quashed; and for grounds states movant is an unincorporated labor organization with offices at

San Francisco, California; that the purported service of summons on movant was made on Verne Albright at Cordova, Alaska; that the said Verne Albright was not at the said time of purported service of summons an officer or agent of movant, or an officer or agent of movant upon whom service of summons of any court of the United States could lawfully be made on movant; all of which appears from the files and records of the Court and from the affidavit attached hereto, and made a part hereof by reference, and from the affidavit of Germain Buleke heretofore filed herein.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HENRY RODEN,
WILLIAM L. PAUL, JR.

Attorneys for International Longshoremen's and
Warehousemen's Union, Movant.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel for Movant.

Copy received. [5]

[Title of District Court and Cause.]

AFFIDAVIT OF VERNE ALBRIGHT

United States of America
Territory of Alaska—ss.

Verne Albright, being first duly sworn, on oath deposes and says:

That he is the identical person on whom the sum-

mons is alleged to have been served in this cause. Affiant states that on or about November 10, 1947, he was appointed an International Representative of International Longshoremen's and Warehousemen's Union (hereinafter referred to as "ILWU") by the International Organizing Committee of said union. Affiant states that while he was never given any written instructions concerning his duties as an International Representative of the ILWU, he had had previous discussions with Germain Bulcke, Second Vice-President of ILWU, in connection with this matter, and that Mr. Bulcke had orally informed him that his principal duty as International Representative would be to serve as a liaison between ILWU locals in Alaska and the office of ILWU in San Francisco, and that his other duties would be to report to the ILWU office in San Francisco on the observance of ILWU's constitution and by-laws by the locals in Alaska and on the general conditions of labor relations as such reports were specifically requested by ILWU, or at semi-monthly intervals; to organize new ILWU locals in Alaska; to assist in labor relations and negotiations between ILWU locals in Alaska and employers, but only at the request of said locals and in their interest and on their behalf; to provide service to ILWU locals in Alaska in the sense of advising them on labor relations matters and other problems which they might have.

Affiant further states that he has not had, nor does he now have, any general power to bind ILWU

in any particular, nor did he have at any of the times herein mentioned, power or authority, generally to bind or commit or obligate ILWU in any way. Similarly, save and except that at the specific [6] Instance and request of locals in Alaska, he had no power to bind or commit the locals.

Each local is autonomous within ILWU and this autonomy is complete with regard to the commencement or cessation of labor disputes or the cooperation or lack of it with other labor organizations.

Affiant states that his power to bind ILWU is limited to matters specifically and specially referred to him by ILWU and only if, as and when such power to bind is specifically and specially conferred upon him by ILWU.

Affiant states that at no time has he specifically or specially or in any other way been empowered to accept the service of process for and on behalf.

Affiant further states with regard to the labor dispute currently existing between the Juneau Spruce Corporation and defendant Local Union 16 of ILWU as follows:

1. This is a dispute between the company and Local Union 16. It is not a dispute between the company and the ILWU.

2. Affiant's activities in connection with this dispute insofar as they relate to ILWU have been as follows:

- (a) Making general reports on the dispute to ILWU approximately semi-monthly; this is part of affiant's general duty to ILWU informed on the

progress of all such matters in which his locals are interested.

(b) Rendering to Local 16 his usual advisory services as requested from time to time by Local 16. Such advice consisted principally of advice on questions of whether the action or contemplated action of Local 16 is or is not within the power of Local 16, and whether it is or is not advisable to take from time to time.

(c) Affiant has made no request either on his own initiative or on behalf of Local 16 for any assistance, cooperation, approval, disapproval, permission or ratification of any kind of action taken by Local 16 in said labor dispute to ILWU or to any other locals of ILWU.

(d) There has been no assistance, cooperation, approval, disapproval, permission or ratification by ILWU of any of the action taken by Local 16.

(e) The only instructions affiant has received from ILWU in connection with this matter is that he is to make himself available to Local 16 for the purpose of exploring with it and its officers any possibilities or settlement of the controversy between Local 16 and the employer. Affiant is to make only recommendations in this connection; the ultimate authority to settle a controversy on any terms is vested in Local 16.

(3) No money or other thing of value has been paid or obligated to be paid by Local 16 to ILWU on account of said dispute directly or indirectly. Nor has any money or thing of value been paid or

obligated to be paid by ILWU to Local 16 on account of said dispute.

4. ILWU has not instigated, maintained or advised the commencement or continuance of said dispute directly or indirectly, specifically or generally; ILWU is not now, nor has it even been since long prior to the commencement of said dispute, engaged in the business of instigating, maintaining or advising the commencement or continuance of any labor disputes including said dispute between any Alaskan employers and any local unions in Alaska, including Local 16; no specific benefit is recognized, known to exist, or expected to be obtained by ILWU from said dispute, if said Local 16 wins or compromises said dispute; and no specific injury is recognized known to exist, or expected to be incurred by ILWU from said dispute if Local 16 loses or compromises said dispute; the only money or thing of value that goes from Local 16 to ILWU is the payment of the regular per capita tax from the Local to ILWU and that is not affected by this dispute.

5. ILWU is an unincorporated labor organization and has no officers or agents in Alaska to represent it. It maintains no office at any point or points in Alaska. It has no agent for the service of process in Alaska now or at any of the times herein mentioned.

6. The system of organization of ILWU herein

described has been the only system maintained since about 1937.

7. The governing body of ILWU is its membership; that its membership functions through annual conventions; that in between conventions there are meetings of its Executive Board, and in between meetings of the Executive Board, it is governed by its four titled officers, to wit, a president, a first vice-president, a second vice-president, and a secretary-treasurer; that all of the titled officers of ILWU are residents of the State of California, and transact their business in the State of California; that the executive Board transacts its business in the State of California; that the members of the Executive Board are residents of the States of Oregon, Washington and California, and transact the business delegated to them by the said Board in the states of their residence; that no member of the Executive Board is a resident or inhabitant of Alaska, nor has there been a member of the Executive Board in Alaska since prior to the commencement of this suit.

8. That ILWU during all the times herein mentioned, maintains, recognizes, cooperates and participates in and customarily ratifies no other activities than those above set forth except purely educational and publicity activities of a general nature on labor relations matters.

9. That affiant is not now, nor has he ever been, authorized generally or specially to accept service

of summons on behalf of ILWU in this or any other cause, or to appear for or represent ILWU in any court.

10. Affiant makes this affidavit for the purpose of supporting the special appearance of ILWU.

/s/ VERNE ALBRIGHT.

Subscribed and sworn to before me this December 27, 1948.

[Seal] /s/ ORPHA C. MILLIGAN,
Notary Public for Alaska.

My Commission expires June 3, 1952.

Copy received. [9]

[Title of District Court and Cause.]

MINUTE ORDER OF MARCH 11, 1949

At this time the Court filed its Opinion in this case in which it was decreed that this Court had jurisdiction of the International Union, which in effect overruled defendants' demurrer on both grounds. Later, upon the calling up for argument, Motion to Strike in cause No. 6046-A, it was stipulated between counsel that the effect of the decision above mentioned would also have the effect of overruling the defendants' two other motions in this case. The Motion to Quash was made and overruled. [10]

[Title of District Court and Cause.]

DEMURRERS

Come now defendants and demur to plaintiff's complaint, and for grounds state:

1. This Court has no jurisdiction of the person of the defendants.

2. This Court has no jurisdiction of the subject of the action.

HENRY RODEN and
WILLIAM L. PAUL, JR.,
Attorneys for Defendants.

By WILLIAM L. PAUL, JR.,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1948. [11]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO WITHDRAW DEMURRER

Comes now International Longshoremen's and Warehousemen's Union by its Attorneys, and moves the court for leave to withdraw insofar as it is concerned, the demurrers which appear to have been filed in its behalf heretofore; and for grounds states that said demurrers were filed by William L. Paul, Jr., and Henry Roden at the instance and request

of Verne Albright; that the said Verne Albright; that the said Verne Albright was without authority to employ any attorneys, including William L. Paul, Jr., and Henry Roden, for movant in this cause, or to authorize attorneys in any manner to proceed; and said demurrers are not the pleading of movant; all of which appears by affidavits attached hereto and made a part hereof by reference.

GLADSTEIN, RESNER,
ANDERSEN and SAWYER,
WILLIAM L. PAUL, JR. and
HENRY RODEN,

Attorneys for International Longshoremen's and
Warehousemen's Union, Movant.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel for Movant. [12]

[Title of District Court and Cause.]

AFFIDAVIT OF GERMAIN BULCKE

State of California,
City and County of San Francisco—ss.

Germain Buleke, being first duly sworn, deposes and says:

That I am now and at all times herein mentioned have been a title officer, to wit, Second Vice-President of the International Longshoremen's and Warehousemen's Union (hereinafter referred to as

“ILWU”); that I have been informed that Verne Albright has been served with a summons in the above-entitled matter; that Verne Albright is not now and never has been authorized to accept service of summons or any other process for and on behalf of ILWU, or to appear for or represent ILWU in any court; that Verne Albright was appointed an “International Representative” of ILWU in November of 1947; that prior to his appointment, while I was engaged in a tour of Alaska, I discussed [13] with him the possibility of such appointment and informed him that if the officers of ILWU decided to appoint him to that post, his principal task would be that of communicating conditions in Alaska which affect ILWU locals to the San Francisco offices of ILWU, and to give advice to ILWU locals in Alaska as requested by those locals and only when requested by those locals, in connection with labor relations matters in which they might be involved. Actually, Albright’s principal function in Alaska is to assist and advise the local unions there on their own behalf and in their own interest, and to inform the ILWU of what he is doing. This function would normally be performed by an officer or officers of the local unions in Alaska but since their financial condition is such as not to permit them to maintain such a person in full time employment, the ILWU officers simply chose one of the Alaska members and undertook to provide him with a salary. Apart from receiving his salary from the ILWU and from making

periodic reports to the ILWU, Albright has no other connection with the ILWU. His chief duties are to assist the locals as and when requested by them.

He certainly had never been authorized to, nor does he have the power to, bind the ILWU in any respect save and except as that power may from time to time be specially conferred upon him; no power, either specially or generally, was conferred upon him with respect to representing, binding or committing the ILWU in connection with this lawsuit, and no power has ever been conferred upon him generally or specifically, with respect to the service of process on him as a representative of the ILWU.

GERMAIN BULCKE.

Subscribed and sworn to before me this 16th day of December, 1948.

[Seal]

ALICE C. MORSE,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 3, 1949. [14]

[Title of District Court and Cause.]

MOTION FOR CERTIFICATE

Comes now International Longshoremen's and Warehousemen's Union, one of the defendants above named, by its attorneys undersigned, and appearing specially for the purposes of this motion and none other, moves the court for an order that its certificate issue to the Attorney General of the United States under and pursuant to Title 28, Sec. 2403, United States Code; and for grounds states that it appears from the special appearance of this defendant heretofore filed herein to quash service of summons that a question of the constitutionality of Sec. 301 (e) of the Labor Management Relations Act, 1947, will be raised by movant, in that said section seeks to create agency relationships and liabilities therefor irrespective of whether such agency relationships exist in fact, contrary to and in violation of the "due process" clause (Amendment V) of the U. S. Constitution.

GLADSTEIN, ANDERSEN,

RESNER & SAWYER.

HENRY RODEN and

WILLIAM L. PAUL JR.,

Attorneys for Movant.

By /s/ WILLIAM L. PAUL, JR.,

Of Counsel.

Copy received January 3, 1949.

[Endorsed]: Filed Jan. 3, 1949. [15]

[Title of District Court and Cause.]

MOTION FOR CERTIFICATE BY LOCAL 16

Comes now Local No. 1-16 of the defendants above-named, and moves the court that its certificate issue to the Attorney General of the United States under and pursuant to Title 28, Sec. 2403, U. S. Code (1948) that the constitutionality of the Labor Management Relations Act, 1947, Section 303 (b) has been drawn into question by this defendant, in that the reference made in said section 303 (b) purports to confer jurisdiction on "any court" irrespective of whether any court has power to confer or allow the right to trial by jury or adequate notice and hearing, contrary to and in violation of the "due process" clause (Amendment V) and the "equal protection" clause (Amendment XIV, Sec. 1) of the U. S. Constitution.

HENRY RODEN and
WILLIAM L. PAUL, JR.,
Attorneys for Movant.

By WILLIAM L. PAUL, JR.,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 11, 1949. [16]

[Title of District Court and Cause.]

ORDER OVERRULING DEMURRER AND DENYING MOTIONS

The Court having called on for hearing the following described Demurrer and Motions and the respective parties having been heard in open court with respect thereto, and the Court having filed its Opinion herein holding that the Demurrer must be overruled, both with respect to its jurisdiction over the person of the defendants and its jurisdiction over the subject of this action; and the Court being fully advised in the premises with respect to:

1. Both Defendants Demurrer to Plaintiff's Complaint on the grounds that this court has no jurisdiction over the person of the defendants and that this court has no jurisdiction over the subject of the action.

2. The Motion of International Longshoremen's & Warehousemen's Union, Local No. 1-16, requesting that a Certificate issue to the Attorney General of the United States under the provisions of Title 28, Section 2403, U. S. Code, 1948, because a constitutional question has arisen under Sec. 303(b) of the Labor Management Relations Act.

3. The Motion of International Longshoremen's & Warehousemen's Union for an Order certifying to the Attorney General of the United States pursuant to Title 28 Sec. 2403 U. S. Code, that a constitutional question has arisen under Sec. 301(e) of the Labor Management Relations Act. [17]

4. The Motion of International Longshoremen's & Warehousemen's Union to quash service of the summons upon said defendant.

5. The Motion of International Longshoremen's & Warehousemen's Union for leave to withdraw its Demurrer with respect to this Court's jurisdiction over the person and subject of said defendant.

The court having heard the argument and considered the briefs filed by the parties, orders as follows:

It Is Hereby Ordered that the above-described Demurrer is hereby overruled on both grounds stated therein, and said Motions are each hereby denied. The Defendants are allowed ten (10) days from March 11, 1949, within which to further plead without prejudice to their right to apply for a further extension of time within which to plead if good cause is shown that they are unable to further plead within such time.

Done in open court this 18 day of March, 1949.

GEORGE W. FOLTA,
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 18, 1949. [18]

[Title of District Court and Cause.]

ANSWER & AFFIRMATIVE DEFENSE

Comes now defendant International Longshoremen's and Warehousemen's Union, Local 16, hereinafter called "Local 16," and answering the complaint, admits, denies and alleges as follows:

1. Answering paragraph one of said complaint, Local 16 denies each and every allegation therein contained and the whole thereof.

2. Answering paragraph two of said complaint, Local 16 admits the material allegations thereof.

3. Answering paragraph three of said complaint, Local 16 denies each and every allegation therein contained and the whole thereof.

4. Answering paragraph four of said complaint, Local 16, admits the material allegations thereof.

5. Answering paragraph five of said complaint, Local 16 admits the material allegations thereof, except that Local 16 denies "that the loading and unloading of its (plaintiff's) barges at its mill is an essential part of the manufacturing * * * of plaintiff's lumber and lumber products."

6. Answering paragraph six of said complaint, Local 16 denies each and every allegation therein contained and the whole thereof.

7. Answering paragraph seven of said com-

plaint, Local 16 denies each and every allegation therein contained and the whole thereof.

8. Answering paragraph eight of said complaint, Local 16 denies each and every allegation therein contained and the whole thereof. [19]

9. Answering paragraph nine of said complaint, Local 16 denies each and every allegation therein contained; and particularly Local 16 denies that plaintiff will be damaged in the sum of \$193,000, or in any other sum or at all.

10. Answering paragraph ten of the complaint, Local 16 denies each and every allegation therein contained and the whole thereof.

Affirmative Defense

As a further and affirmative defense, defendant Local 16 alleges as follows:

11. Juneau Spruce Corporation, hereinafter called "the Company," is a business enterprise incorporated and existing by virtue of the laws of the Territory of Alaska, and has its principal place of business in Juneau, Alaska.

12. The Company has been and is engaged principally in felling timber and manufacturing lumber products from its logs, in which latter operation it operates a mill in Juneau, Alaska. The value of the products manufactured by the Company annually is in excess of \$1,000,000.00, which products are sold and shipped by the Company from Juneau to cus-

tomers in the Territory of Alaska in places other than Juneau, and to customers in various States of the United States, being transported to the latter customers by seagoing, waterborne carriers and by railway carriers operating through Canada and through various States of the United States.

13. The Company is engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Labor Management Relations Act of 1948, hereinafter called the "Act."

14. Local 16 is a labor organization within the meaning of Section 2, subsection (5) of the Act, functioning as such in the Territory of Alaska since prior to 1937.

15. Local 16, ever since 1937, has been and now is a party to a collective bargaining agreement with all employers engaged in business along the waterfront in Juneau, Alaska, duly organized and all commonly known as the "Waterfront Employers Association of Juneau, Alaska," which collective bargaining agreement included the following provisions: That the said employers agreed to hire for longshore [20] work, members of Local 16; and Local 16 agreed to assist said employers in calling its members to work; and Local 16 further agreed to use reasonable efforts to provide as many persons for longshore work as said employers called, first exhausting the aforesaid preference, and then providing "extra" men; and if the aforesaid preference and extra men were not available, the said employers were free to hire whomsoever they chose for

said work. That in actual practice said employers hired very few persons not members of Local 16 or extra men provided by Local 16, Local 16 being able to provide the number of persons requested by the employer. Each extra man is granted a permit by Local 16 to work at longshoring, which grant is without restriction, except the payment of a nominal fee. That under and by virtue of said agreement, members of Local 16, since the Company commenced operations, have been employees of the Company.

16. Ever since the commencement of its operations, Juneau Spruce Corporation has been and now is a party to the collective bargaining contract described in paragraph 15 hereof.

17. In the course of the Company's said operations and beginning about May 1, 1947, the Company used one or more seagoing barges, steamships, pot scows, inland water barges, tug boats, cannery tenders and other types of floating equipment to transport its lumber by water from its mill in Juneau to places of delivery in Canada, Alaska, and the Continental United States, and in ocean transportation, and assigned certain of its employees, who worked usually in a different appropriate collective bargaining unit, to wit, in its mill and mill yard, to load its lumber aboard said barges at its said mill yard and dock, and refused to assign its employees, to wit, members of Local 16, to load said barges.

18. On or about October 23, 1947, with full knowledge, acquiescence and consent of IWA, Local M-271, Local 16, then and subsequently, asserted to the Company that it would picket the operations of the Company at its mill in Juneau because the Company was violating the contract described in paragraph 15 hereof, unless the Company agreed to abide by said contract and reduce the terms thereof to writing. [21]

19. On April 10, 1948, at the hour of approximately 6:00 a.m., Local 16 engaged and continued in peacefully picketing the operations of the Company at its mill in Juneau throughout 1948, to induce compliance with its assertions set forth in paragraphs 15 and 17 hereof.

Wherefore, Local 16 prays that the Complaint be dismissed and plaintiff go without day.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER and

HENRY RODEN and

WILLIAM L. PAUL, JR.,

Attorneys for ILWU Local 16.

By WILLIAM L. PAUL, JR.,
Of Counsel.

United States of America,
Territory of Alaska—ss.

Joe Guy of Juneau, Alaska, being first duly sworn, on oath deposes and says: That I am agent

for Local 16 and am duly authorized by said Local to make verifications of this nature on its behalf and now so act; that I have read the foregoing Answer and Affirmative Defense, know the contents thereof, and the same is true.

JOE GUY.

Subscribed and sworn to before me this 24th day of March, 1949.

[Seal]

WILLIAM L. PAUL, JR.,
Notary Public for Alaska.

My Commission expires Jan. 19, 1952.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 24, 1949. [22]

[Title of District Court and Cause.]

MINUTE ORDER OF APRIL 27, 1949

This case came on before the court for trial by jury. Upon roll call the entire jury was found to be present. Plaintiff was represented by N. C. Banfield and Manley D. Strayer. Defendants were represented by Henry Roden, William L. Paul and George Anderson, the latter having been admitted as associate counsel in this case only. Plaintiff moved for permission to file his second amended complaint; defendants objected but the objection was overruled and the second amended complaint

was filed. It was thereupon stipulated that the answers on file will apply as to the amended complaint, and thereupon plaintiff filed an amended reply, after which the Court proceeded to empanel a jury to try the case. At 5:00 p.m., a jury not having been secured, court was adjourned until tomorrow morning at 10:00 o'clock.

[Title of District Court and Cause.]

ANSWER

Comes now International Longshoremen's and Warehousemen's Union, hereinafter called "ILWU," one of the defendants above named, and answering plaintiff's complaint, admits, denies, and alleges as follows:

1. Answering paragraph one of said complaint, ILWU denies each and every allegation therein contained.

2. Answering paragraph two of the Complaint, ILWU admits the material allegations therein contained.

3. Answering paragraph three of said complaint, ILWU denies each and every allegation therein contained and the whole thereof.

4. Answering paragraph four of said complaint, ILWU denies each and every allegation therein contained except that ILWU admits that Local 16, therein referred to, was and is a labor organization.

5. Answering paragraph five of said complaint, ILWU alleges that it does not have knowledge or information sufficient to form a belief as to whether the allegations contained therein are true, and, therefore, denies each and every allegation therein contained.

6. Answering paragraph six of said complaint, ILWU alleges that it does not have knowledge or information sufficient to form a belief as to whether the allegations contained therein are true, and, therefore ILWU denies each and every allegation therein contained.

7. Answering paragraph seven of the complaint, ILWU denies each [24] and every material allegation therein contained and the whole thereof.

8. Answering paragraph eight of said complaint, ILWU denies each and every material allegation therein contained and the whole thereof.

9. Answering paragraph nine of said complaint, ILWU denies each and every material allegation therein contained and the whole thereof; and particularly denies that plaintiff has been damaged in the sum of \$193,000 or in any other or at all, on account of any matter or thing done or left undone by this answering defendant.

10. Answering paragraph ten of said complaint, ILWU denies each and every allegation therein contained and the whole thereof.

Wherefore, the answering defendant prays that

plaintiff recover nothing against it and that it recover its costs and disbursements herein.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER, and
WILLIAM L. PAUL, JR., and
HENRY RODEN,
Attorneys for Defendants.

By WILLIAM L. PAUL, JR.,
Of Counsel.

United States of America,
Territory of Alaska—ss.

William L. Paul, Jr., of Juneau, Alaska, being first duly sworn, on oath deposes and says that I am one of the Attorneys for Defendants and am duly authorized by said defendant to make this verification in their behalf; that defendant ILWU is not at place where verification is made; that I have read the foregoing Answer, know the contents thereof and the same is true.

WILLIAM L. PAUL, JR.,
Affiant.

Subscribed and sworn to before me this 24th day of March, 1949.

[Seal] SUE M. KENNEDY,
Notary Public for Alaska.
My Commission Expires April 18, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1949. [25]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and in reply to the affirmative defense of the defendant, International Longshoremen's and Warehousemen's Union Local 16, the plaintiff admits and denies the allegations thereof as follows:

I.

Plaintiff admits the allegations of paragraph numbered 11 in said defendant's affirmative defense.

II.

Plaintiff admits the allegations of paragraph numbered 12 of said defendant's affirmative defense.

III.

Plaintiff admits the allegation contained in paragraph numbered 13 of said defendant's affirmative defense.

IV.

Plaintiff admits the allegations of paragraph numbered 14 in said defendant's affirmative defense.

V.

Plaintiff has insufficient knowledge regarding the statements made in paragraph numbered 15 of said defendant's affirmative defense to form a belief regarding the same and therefore denies each and every allegation of said paragraph except that plaintiff specifically denies that Local 16 has been

or now is a party to a collective bargaining agreement with all employers engaged in business along the waterfront in Juneau, Alaska, and further denies that [26] members of Local 16, since the commencement of its operations, have been employees of the company by virtue of said agreement.

VI.

Plaintiff denies the allegations contained in paragraph numbered 16 of said defendant's affirmative defense.

VII.

Plaintiff admits the allegations of paragraph numbered 17 of said defendant's affirmative defense except that plaintiff denies that the employees assigned to load lumber aboard said barges usually worked in a different appropriate collective bargaining unit than the one to which the members of Local 16 belonged.

VIII.

Plaintiff admits the allegations of paragraph numbered 18 of said defendant's affirmative defense except that plaintiff denies that the assertion to the company alleged in said paragraph was made with the acquiescence and consent of I.W.A. Local M-271.

IX.

Plaintiff admits the allegations contained in paragraph numbered 19 of said defendant's affirmative defense.

Wherefore, plaintiff prays that said affirmative defense be dismissed and held for naught, and that plaintiff be given relief as prayed for in plaintiff's complaint.

FAULKNER, BANFIELD &
BOOCHEVER,

By N. C. BANFIELD,
Of Counsel for Plaintiff.

[Endorsed]: Filed April 1, 1949. [27]

[Title of District Court and Cause.]

DEFENDANTS' REQUESTED
INSTRUCTIONS

Respectfully submitted,

WILLIAM L. PAUL, JR.,
Of Attorneys for Defendants.

No. 1

You are instructed that it is the public policy of the United States that—

Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its

relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of the Labor Management Relations Act of 1947, oftentimes called the "Taft-Hartley Act," in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Approved:

Refused:

Modified: [29]

No. 2

The Taft-Hartley Act was enacted in the interest of public policy to avoid economic strife and warfare, and so if you find from a consideration of all the evidence in this case that the action of the Juneau Spruce Corporation in refusing to accede to the demand of IWA M-271 to turn over the loading of barges to Local 16 was unreason-

able or unjustifiable, in view of that provision, plaintiff is not entitled to recover any damage it may have sustained on account of such unreasonable or unjustifiable refusal to bargain.

This policy is applicable only to the territorial limits of the United States and not to Canada.

Given:

Refused:

Modified:

No. 3

You are instructed that while neither IWA M-271 nor Local 16 has been certified as the bargaining agent for the employees or any craft or class of such employees of the plaintiff, nevertheless both unions had the right under the law to bargain with the plaintiff for the members of their respective organizations.

In this connection you are instructed that if the electricians, plumbers, carpenters, or members of any other craft employed by Juneau Spruce Corporation has the right under the Taft-Hartley Act to bargain with it in the interest of its members, and if they offered to do so it becomes the duty of the plaintiff to negotiate with them or any of them.

Given:

Refused:

Modified: [30]

No. 4

The Court further instructs you that even though there was an agreement entered into on November 3, 1947, between Juneau Spruce Corporation and the IWA M-271, the IWA had the right at any time, as a matter of law, with the approval of Juneau Spruce Corporation, to assign its or any part of the longshore work to Local 16.

Given:

Refused:

Modified:

No. 5

You are further instructed that picketing is a form of free speech guaranteed by the Constitution of the United States. Picketing alone does not of itself give rise to a cause of action for damages. There must be additional evidence showing by a preponderance that such picketing was accompanied by acts of coercion or intimidation by defendants or either of them of plaintiff or plaintiff's employees to the extent that such coercion or intimidation in addition to the picketing caused them to refuse to go through the picket line.

In determining whether a preponderance of the evidence shows coercion or intimidation, you are instructed that the fact that members of IWA M-271 and others went through the picket line from July to October 11, 1948, may be considered in relation to the situation as it existed on April 10, 1948, as well as all other facts and circumstances of the case.

If you find that members of IWA M-271 and other employees of plaintiff voluntarily agreed or decided not to go to work, you cannot hold the defendants or either of them responsible; and you should find your verdict for defendants.

Given:

Refused:

Modified:[31]

No. 6

In this case evidence has been introduced that Verne Albright, Germain Bulcke and John Barry represented themselves as agents of the defendant International Union. In this connection, you are instructed that the mere statement of a person that he is the agent of another is not sufficient to establish such agency and unless you find from other evidence in this case which shows that the International Union actually and actively engaged in an effort to compel the Juneau Spruce Corporation to assign the loading of its barges to Local 16, the agency has not been established and it will be your duty to return a verdict in favor of the defendant International Union.

Given:

Refused:

Modified:

No. 7

In this case the plaintiff is suing for \$1,025,000 damages and have introduced evidence in support of their claim. Money damages is something that

the jury should not lightly consider. The law requires that before any damages may be awarded, the amount of said damages must be definitely and precisely shown and proved. It is not sufficient for the plaintiff simply to allege that it has sustained damages and put in some proof to support its claim; and before you can award damages against these defendants or either of them, the exact amount of such damages must be definitely proved. Guesses as to the amount or guesses as to hoped-for profits, unsupported by definite, credible evidence, is not sufficient proof upon which you can award damages in any sum.

Given:

Refused:

Modified: [32]

No. 8

You are instructed that the change of ownership of a manufacturing plant in no way affects a contract existing between the seller and his employees.

“It is the employing industry that is sought to be regulated and brought within the correct and remedial provisions of the Taft-Hartley Act.”

And if you find from a consideration of all the evidence in this case that a contract existed between Local 16 and Juneau Lumber Mills at the time that the latter sold its plant to the Juneau Spruce Corporation under the terms of which contract Local 16 had the exclusive right to do all longshore work needed by Juneau Lumber Mills, it became and was the duty of plaintiff after its purchase

of said plant to continue to observe the provisions of that labor contract for the period of time it had to run or until it was mutually modified or terminated and then to bargain in good faith with Local 16 for a renewal thereof.

The phrase, "bargain in good faith" means what an ordinarily prudent man would do in similar circumstances towards bringing about a meeting of the minds of the parties concerned in the situation, and necessarily includes that each part confront the other openly and honestly and in such manner as to apprise the other fully of its meaning and intentions, and includes the element that neither party shall deliberately bring about an impasse.

National Labor Relations Board vs. Hopps
Mfg. Co., 170 Fed. (2d) 964.

Given:

Refused:

Modified: [33]

No. 9

I further instruct that under section 9 (c) (1) (b) of the Taft-Hartley Act, if two or more individuals or labor organizations present a claim to an employer to be recognized as a bargaining representative for any group of employees, that under such circumstances the employer, facing the claim of two different groups or unions also has the right to petition the National Labor Relations Board to have the question investigated and then an immediate election to determine who shall be

the representative of the group of workers involved.

In view of the foregoing, you may consider the failure of the employer to resort to the National Labor Relations Board as a matter in mitigation of any alleged damages claimed to have been suffered or sustained by the employer, in this instance the Juneau Spruce Corporation.

Given:

Refused:

Modified:

No. 10

I further instruct you that if you find that the employer wilfully failed or refused to petition the National Labor Relations Board alleging that two unions were claiming jurisdiction over certain work, to wit, longshoring, and seeking to have the National Labor Relations Board conduct an investigation and immediate election to determine the proper bargaining unit, then I instruct you that the plaintiff cannot recover for any claimed damage, as its failure to comply with the provisions of the Act mentioned operate as a bar to recovery

Section 9, Labor Management Relations Act,
1947.

Given:

Refused:

Modified: [34]

No. 11

Labor contracts may be oral or in writing, or

partly oral and partly in writing. They may be made through formal negotiations between the parties or be adopting the provisions of another contract existing between the same or other parties, or by adopting the customs and practices in a trade or industry which have been acquiesced in over a period of time.

If you find from a consideration of the evidence in this case that an agreement existed between Local 16 and the Juneau Lumber Mills, under which Local 16 performed all longshore work needed by Juneau Lumber Mills and that the plaintiff in this case adopted such agreement and hired members of Local 16 to do its longshore work, it may be fairly concluded that plaintiff adopted the contract formerly existing between Juneau Lumber Mills and Local 16 and it is bound by that adoption, and is required to carry out the terms thereof in good faith.

A labor contract, whether it be in writing or oral, or partly in one and partly in the other, should be construed in the light of all the facts and circumstances affecting the subject matter with which it deals. And you are authorized in arriving at a decision in this case to consider all evidence introduced relating to the manner in which the parties themselves interpreted the provisions of that contract or agreement.

Given:
Refused:
Modified: [35]

No. 12.

You are instructed that section 201 of the Taft-Hartley Act provides as follows:

That it is the policy of the United States that:

“(a) Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

“(b) The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for settlement of disputes; and

“(c) Certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within

such agreement provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.”

No. 13

Section 204 of the Taft-Hartley Act provides as follows:

“(a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall:

“(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provisions for adequate notice of any proposed change in the terms of such agreement;

“(2) Whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously;

“(3) In case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this act for the purpose of aiding in a settlement of the dispute.”

No. 14.

There has been introduced in evidence the determination of the National Labor Relations Board relating a labor dispute at the Juneau Spruce Corporation. This was introduced for the sole purpose of showing that no union has been certified at the Juneau Spruce Corporation plant, and this exhibit or any other reference to the National Labor Relations Board or its decisions are to be considered by you as evidence in this case than for the limited purpose for which said determination was introduced.

Given:

Refused:

Modified: [37]

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the plaintiff and the defendants, and a true verdict render according to the law and the evidence as given to

you on the trial. That oath means that you will not be swayed by passion, sympathy or prejudice, and that your verdict will be the result of a careful consideration of all the evidence and the instructions of the Court as to the law.

Neither the statements of counsel engaged in the trial of this case, nor the allegations of the pleadings, except so far as they constitute admissions, are to be considered by you as proof of the facts to which they relate. You should not regard or consider the relative financial condition of the parties to the suit, nor the effect of your verdict upon the parties, or any of the, or attempt to arrive at a verdict based upon your individual or collective opinions as to the abstract principles of justice which should govern the case.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts. [39]

No. 2

By this action the plaintiff seeks to recover from the defendants damages in the sum of \$1,025,000 which it alleges it sustained in consequence of the acts of the defendants. The defendants will hereinafter be called the "International" and "Local 16" respectively.

The complaint alleges that during all the times material here the plaintiff has conducted a lumber manufacturing business, consisting of a sawmill at Juneau, retail lumber yards at Juneau, Anchorage and Fairbanks, and logging camps, and has shipped its products wholly or partially by water in interstate commerce; that, although the International Woodworkers of America was the recognized bargaining agent of plaintiff employees at Juneau, the defendants from April 10, 1948, to the time of bringing this action have nevertheless engaged in and induced and encouraged the employees of plaintiff and of other employers to engage in a concerted refusal in the course of their employment to manufacture, process, transport or otherwise handle or work on any goods, article, materials or commodities of plaintiff, or to perform any services for the plaintiff, for the purpose of compelling plaintiff to assign the loading of its barges with its lumber to members of Local 16 of the International Longshoremen's & Warehousemen's Union rather than to the persons, including members of the International Woodworkers of America, to whom said work had theretofore been assigned, and that neither of the defendants has been certified by the National

Labor Relations Board as the bargaining representative of the employees performing such work; that, as a direct and proximate result of picketing and coercion and of the communication of the fact of picketing to other labor organizations, plaintiff's employees refused to work from April 10 to July 19, 1948, and plaintiff was compelled to close its mill; that, although sufficient employees returned to work to permit of the operation of the mill from July 19 to October 11, 1948, at a greatly increased cost, the plaintiff was prevented from shipping its lumber because of the aforesaid acts of the defendants in consequence of [40] which it was again compelled to close its mill on October 11, 1948.

The defendants in their answers deny the foregoing allegations of the complaint, which places the burden of proving them by a preponderance of the evidence on the plaintiff.

No. 3

The provisions of the Taft-Hartley law under which this action is brought, so far as material here, are as follows:

“Section 303(a). It shall be unlawful * * * for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal, in the course of their employment, to manufacture, transport or otherwise handle or work in any goods, articles, materials or commodities, or to perform any services, where an

object thereof is forcing or requiring any employer to assign particular work to employees in a particular labor organization * * * rather than to employees in another labor organization.

“Whoever shall be injured in his business or property by reason of any violation of Subsection (a) may sue therefor in any district court of the United States and shall recover damages by him sustained.”

It is undisputed that the defendants are labor organizations within and subject to the provisions of the Taft-Hartley Act.

No. 4

The Taft-Hartley Act further provides that any labor organization shall be bound by the acts of its agents and that, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the acts done were actually authorized or subsequently ratified shall not be controlling.

Since a labor organization can act only through its officers and agents, it is responsible for the acts of its officers and agents done within the scope of their authority or employment. An agent is one who, by the authority of his principal, transacts his principal's business or some part thereof and represents him in dealing with third persons. [41]

It is undisputed that Germain Bulcke, John

Barry and the witness Verne Albright were, during the time covered by this controversy, officers of International. Hence, they were agents. But it is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, if you find that such acts were committed, was within the scope of their employment.

A person acts within the scope of his employment when he is engaged in doing for his employer either the acts consciously and specifically directed or any act which is fairly and reasonably regarded as incidental to the work specifically directed or which is usually done in connection with such work. If, in doing such an act, a person acts wrongfully, the wrongful act is nevertheless within the scope of his employment.

The scope of employment is to be determined not only by what the principal actually knew of the acts of his agent within his employment but also by what in the exercise of ordinary care and prudence he should have known the agent was doing.

No. 5

Before the plaintiff may recover from the defendants, or either of them, it must prove by a preponderance of the evidence:

(1) That the defendants, or either of them, acting by or through their officers or agents, did, between April 10, 1948, and April 27, 1949, unlawfully engage in, or induce or encourage plaintiff's em-

ployees at Juneau, Alaska, or employees of other employers to engage in, a concerted refusal in the course of their employment to manufacture, process, transport or otherwise handle or work on lumber of plaintiff, or to perform any services for plaintiff;

(2) For the purpose of forcing and requiring the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom said work had theretofore been assigned;

(3) That such acts, or any of them, if committed by and as the officers or agents of the defendants, or either of them, were within the scope of the employment of such officers or agents;

(4) That as a direct and proximate cause thereof the plaintiff was damaged.

No. 6

If you find from a preponderance of the evidence that during the period stated the defendants, acting separately or jointly, engaged in or induced or encouraged plaintiff's employees at Juneau, Alaska, to engage in, a concerted refusal in the course of their employment to manufacture, process, transport or otherwise handle or work on any lumber, or to perform any services for the plaintiff, and that the object thereof was to force or require the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom such work had been assigned, and

that such acts directly and proximately caused pecuniary loss to the plaintiff, your verdict should be for the plaintiff in such amount as you find it has been damaged, not exceeding in any event the amount sued for. On the other hand, if you do not so find, your verdict should be for the defendants.

In this connection you are instructed that, if you find from a preponderance of the evidence that the defendants, through their officers or agents acting within the scope of their employment, entered into a conspiracy or understanding to commit the aforesaid acts or any of them for the object or purpose stated, or acted jointly or in pursuance of a common purpose or design, then from the time of entering into such a conspiracy or understanding everything that was done, said or written by any of the officers or agents of either in furtherance of such conspiracy or understanding and to effect the object or purpose thereof, regardless of whether done, said or written in Alaska or elsewhere, is binding on both of the defendants just as though they themselves, through their officers or agents, had done such acts or made such statements, and if the object of the conspiracy was accomplished, resulting in damage, each is liable for the whole thereof regardless of the degree of participation in the commission of the acts charged, or any of them.

A conspiracy, common purpose or design may be proved by direct evidence or by proof of such circumstances as naturally tend to prove it and which are sufficient in themselves to satisfy an ordinary

prudent person of the existence thereof. Therefore, it is not necessary that such a combination or understanding be shown to be in writing. It is sufficient if the evidence shows a combination of or cooperation between two or more persons to accomplish a common purpose.

On the other hand, if you find that the defendants did not act in concert or in pursuance of a common purpose or design, you will consider the case against each defendant separately, and you may find either or both or neither of them liable.

No. 7

You are instructed that two or more persons or organizations may participate in a wrong although they do so in different ways, at different times and in unequal proportions. One may plan and the other may be the actual instrument in accomplishing the mischief, but the legal blame will rest upon both as joint actors. Accordingly, one who directs, advises, encourages, procures, instigates, promotes, aids or abets a wrongful act by another is as responsible therefor as the one who commits the act, so as to impose liability upon such person to the same extent as if he had performed the act himself. [44]

No. 8

If you should find that plaintiff is entitled to recover against the defendants or either of them, it will then become your duty to assess the amount of damages which plaintiff may have sustained. In such event your verdict should be in such amount

as will fairly and reasonably compensate the plaintiff for the damage which it has sustained and which was proximately caused by the acts complained of, including any loss of profits which it is reasonably certain plaintiff would have received but for such acts.

No. 9

By proximate cause is meant the probable and direct cause. It is the cause that sets in motion or operation another or other causes and thus produces the injury. It is the cause which directly produces the injury and without which the injury would not have occurred.

No. 10

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue by a preponderance of the evidence. By a preponderance of the evidence, is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the

evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it. [45]

No. 12

Subject to the law as contained in these instructions, you are also the sole and exclusive judges of the credibility of the witnesses and of the effect and value of the evidence.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony. In determining the credibility of witnesses and the weight to be given their testimony, you decide which witnesses, and what testimony of such witnesses, are to be believed in the same way as you do when someone tells you anything out of court. You size up the

witness, you observe his appearance and demeanor, not his intelligence, whether he is candid and straightforward or shifty and evasive; you consider whether he has an interest in the outcome of the trial and what motive he may have for testifying as he did, the opportunity he had to learn of the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, and the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on the witness' credibility or the weight of his testimony.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the [46] proof of any fact in this case. A witness wilfully false in one part of his testimony may be distrusted in other parts. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You

may, however, be guided by them if you find that they are supported by the evidence and appeal to your reason and judgment.

In considering your verdict you are instructed that any testimony which has been ordered stricken by the Court should not be considered by you for any purpose.

No. 13

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction, founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

No. 14

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and you should not single out one particular instruction and consider it by itself or separately from or to the exclusion of all the other instructions. [47]

As you have been heretofore instructed, your duty is to determine the facts of the case from the evi-

dence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

No. 15

Upon retiring to your jury room you will elect one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room the exhibits and these instructions, together with four forms of verdict which are self-explanatory. You will return your verdict on one of these four forms.

When you have agreed upon a verdict and your foreman has dated and signed it, you will return it into court in the presence of the entire jury, together with the exhibits and these instructions.

Given at Juneau, Alaska, this 12th day of May, 1949.

GEORGE W. FOLTA,
Judge.

[Endorsed]: Filed May 13, 1949. [48]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants in the above-entitled action and move the Court to set aside and vacate the verdict of the jury in this action, and grant a new trial for the following reasons:

1. Errors of law occurring at the trial, and excepted to by defendants, in this, that the Court failed and refused to instruct the jury as requested by defendants in their written instructions duly submitted to the Court and numbered one through fifteen, for the reasons stated in such exceptions, and particularly as follows:

(a) Defendants' requested instruction No. 1 states the public policy of the Labor Management Relations Act, 1947, hereinafter called the "Act," and is material on the issue of whether plaintiff created or maintained the events in controversy to such an extent that plaintiff should not be permitted to maintain this action; and further on the issue of whether plaintiff reasonably acted to mitigate its damages.

(b) Defendants' requested instruction No. 2, for reasons similar to those stated in paragraph (a) hereof; and for the further reason that said Act is applicable only to the territorial limits of the United States.

(c) Defendants' requested instruction No. 3 states that persons or their representatives have a

right to ask for work and crafts have a right to organize, either or both of which the jury could have found to be controlling to define the actions or objects [49] of defendants or defendant Local 16, and consequently the corresponding duty of plaintiff, and require a verdict for defendants.

(d) Defendant's requested instruction No. 4 states matters of law upon which the jury could have found on the evidence that plaintiff created and maintained the events in controversy or failed and refused to mitigate its damages.

(e) Defendants' requested instruction No. 5 defines free speech, coercion and intimidation, all of which were issues of fact in evidence, to such an extent that the jury on the evidence would have found for defendants if they had been instructed as requested.

(f) Defendants' requested instruction No. 6 fully states the law of agency as the same was at issue, and thereby the jury would have returned a verdict for the defendant International Union.

(g) Defendants' requested instruction 7 states the precision with which damages must be proved, and had the jury been so instructed it would have returned a verdict for defendants or at the most nominal damages for the plaintiff.

(h) Defendants' requested instruction No. 8 states the law of succession of labor contracts and also the law of adoption thereof, and the duties to bargain which would have flowed therefrom, and the jury would have found from the evidence that

plaintiff was either successor to the Juneau Lumber Mills contract with defendant Local 16 or had adopted such contractor, from either of which would have arisen the duty of plaintiff to bargain with defendant Local 16 over the events in controversy, and from plaintiff's failure and refusal so to do, would have required a verdict for defendants.

(i) Defendants' requested instruction No. 9 states the law relating to mitigation of damages, which from the evidence would have required the jury to return a verdict for defendants or at the most a verdict for nominal damages.

(j) Defendants' requested instruction No. 10 states the law with regard to whether plaintiff created and maintained the event in controversy upon which upon the evidence the jury would have returned [50] a verdict for defendants, since it was uncontroverted that plaintiff failed and refused to make use of its remedies provided in Section 9 of the Act.

(k) Defendants' requested instruction No. 11 states the law with regard to the creation and existence of a labor contract and its interpretation, and therefrom the jury would have found upon the evidence that there was a labor contract in existence covering longshore work, which was a material point in issue, between plaintiff and Local 16, and the same was interpreted by all to cover longshore work; and found a verdict for defendants.

(l) Defendants' requested instruction No. 12

states the policy of the Act regarding the creation of labor contracts and settlement of all controversies, upon which from the evidence the jury would have found that plaintiff failed and refused to fulfill its legal duties to bargain and to use grievance settlement facilities of the federal government, and thereby would have returned a verdict for defendants.

(m) Defendants' requested instruction No. 13 states the policy of the Act and the effect thereof as stated in paragraph (1) hereinabove.

(n) Defendants' requested instruction No. 15 states the law and the effect thereof as mentioned in paragraph (e) hereof.

2. Errors of law occurring at the trial, and excepted to by defendants in this, that the court instructed the jury as follows:

(a) In Instruction No. 4, the Court in paragraphs 1, 3 and 6 thereof stated the law of agency so narrowly as to confuse the jury and thus require them to return a verdict against defendant International Union.

(b) In Instruction No. 6, the Court instructed the law of conspiracy, on which there was no issue fact at all, and thereby the jury was confused and returned a verdict against defendants.

(c) In instruction No. 11, the Court instructed the jury that Exhibit C was in evidence for a limited purpose only, whereas it was in evidence

generally, and furthermore it was in evidence on a material issue of fact whether a contract existed between Juneau [51] Lumber Mills and Local 16 and between plaintiff and Local 16.

3. Errors of law occurring at the trial and excepted to by defendants, in this:

(a) Plaintiff offered and gave evidence and exhibits, and the Court admitted over the objections of defendants, that plaintiff had not assumed the collective bargaining contract between Juneau Lumber Mills and Local 16; whereas such contract is illegal.

(b) Plaintiff offered and gave evidence and exhibits, and the Court admitted over the objections of defendants, parol evidence the purport of which was to vary the terms of the contract of November 3, 1947.

(c) Plaintiff offered and gave hearsay evidence, and the Court admitted the evidence over objections of defendants, on material issues purporting to be the evidence of members of International Woodworkers of America, on very numerous occasions.

(d) Plaintiff offered in evidence and the court admitted over the objections of defendants the constitution and by-laws of defendants, being Plaintiff's exhibits 3 and 4, whereas the same are immaterial and irrelevant to the issues of law and fact in this controversy.

(e) Plaintiff offered testimony and the court admitted over the objections of defendants that plaintiff had recognized IWA M-271 as the exclu-

sive bargaining agent of its employees, whereas such testimony is immaterial and irrelevant.

(f) Plaintiff offered testimony and exhibits of Verne Albright and John Barry as evidence of agency binding on defendant International Union, whereas such evidence is incompetent and irrelevant for any purpose.

(g) Plaintiff offered testimony and the court admitted the same over objections of defendants, by the witness Hawkins that plaintiff's mill would have a certain future capacity, whereas such testimony is opinion testimony and the said witness was not qualified as an expert or to have had any familiarity with sawmill operation. [52]

(h) Plaintiff offered testimony and the court admitted the same over objections of defendants, by the witness Hawkins that longshoring is not a craft, whereas the said witness was not qualified as an expert on such subject or shown to have any familiarity therewith, and such testimony was opinion, and incompetent.

(i) Plaintiff offered testimony and the court admitted the same over objections of defendant by plaintiff's witness Kirkham to vary the terms of a written document, namely the IWA minutes of April 1, 1948, and such evidence was incompetent, irrelevant and immaterial.

(j) The same with regard to the testimony of plaintiff's witness Flint.

(k) Plaintiff offered testimony and exhibits and the court admitted the same over objections of de-

fendants, by the witness Youns hearsay testimony purporting to be that of Rockwell and Pilfold, and second handed hearsay testimony through Rockwell and Pilfold of which it is purported Albright and Barry had said; and the same was incompetent.

(l) Plaintiff offered testimony and exhibits and the court admitted the same over objections of defendants, by the witness Prawitz of what purported to be market prices of lumber but in the form of a compilation, but the said witness and plaintiff had failed and neglected to make available in any manner the things upon which such compilation was based, and thereby the defendants were denied the right of cross-examination of said witness, and his testimony was incompetent.

(m) Plaintiff offered testimony and the court admitted the same over objections of defendants, by the witness Schultz that members of Local 16 refused to handle plaintiff's lumber but such testimony was immaterial and irrelevant to any of the issues of the controversy and incompetent as hearsay.

(n) Plaintiff offered testimony and the court admitted the same over objections of defendants, by the witness Adams that members of Local 16 refused to handle plaintiff's lumber but such testimony was immaterial and irrelevant to any of the issues of the controversy. [53]

4. Errors of law occurring at the trial and excepted to by defendants, in this:

Defendants offered Exhibit C generally, and Exhibit D for identification generally in evidence, the testimony of the witness Pearson, all on the subject of offers made by local 16 to bargain and its right to bargain with plaintiff, but the court refused the same, although the same was a material issue in the controversy.

(b) The same with regard to offers of Local 16 to arbitrate and the duty of plaintiff to accept such arbitration in this controversy.

(c) The same with regard to the fact that plaintiff, after IWA M-271 refused to bargain concerning longshore work at plaintiff's plant.

(d) The same with regard to the fact that plaintiff never challenged the representation of Local 16 after IWA M-271 refused to bargain concerning longshore work at plaintiff's plant.

5. The said verdict is not supported by sufficient evidence, but is contrary to the evidence.

6. That said Act and the court's interpretation of said Act with regard to the use of free speech and speech generally by Local 16 is unconstitutional in that it abridges arbitrarily the same.

7. That the Court erred in overruling defendant International Union's motion for a direct verdict.

8. That the Court erred in ruling that affidavit of Albright introduced by plaintiff was not generally binding on plaintiff.

9. That the Court erred in overruling defendant Local 16's motion for a direct verdict.

Juneau, Alaska, May 16, 1949.

GEORGE ANDERSEN,
WILLIAM L. PAUL, JR., &
HENRY RODEN,

Attorneys for Defendants.

By WILLIAM L. PAUL, JR.,
Of Counsel.

Copy received May 16, 1949.

[Endorsed]: Filed May 16, 1949. [54]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTAND-
ING VERDICT RESERVING RIGHT TO
APPLY FOR NEW TRIAL

Come defendants and move the court to vacate and set aside the verdict of the jury rendered in said action on May 13, 1949, and to make and render a judgment in favor of defendants as prayed for in their answers, on the ground that the court should have directed at the trial of said action a verdict in favor of defendants, and that the ends of justice require said court to render judgment in favor of defendants as aforesaid. The defendants

reserve the right, in the event this motion is denied, to apply for a new trial.

This motion is made and based upon all the pleadings, papers, records and files in the above-entitled court as well as the minutes of the court and the testimony and exhibits adduced at said trial.

GEORGE ANDERSEN,
WILLIAM L. PAUL, JR., &
HENRY RODEN,

Attorneys for Defendants.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

Receipt of Copy attached.

[Endorsed]: Filed May 16, 1949. [55]

[Title of District Court and Cause.]

MOTION AND AFFIDAVIT FOR ADDI-
TIONAL TIME WITHIN WHICH TO FILE
ADDITIONAL GROUNDS AND SUPPORT-
ING AFFIDAVITS RE MOTION FOR
NEW TRIAL

United States of America,
Territory of Alaska—ss.

William L. Paul, Jr., being first duly sworn, on oath deposes and says that he is of attorneys for defendants in the above cause; that defendants

have already filed their motion for a new trial stating in part the grounds upon which the motion for new trial is made that there are additional grounds for such motion upon which defendants rely, namely that the verdict of the jury was materially influenced by passion and prejudice against defendant and for such cause rendered a verdict against defendants on the merits and in the amount of \$750,000; that affiant has commenced his investigation of the actions of the jurors in their deliberations to the end that affidavits be prepared to support said grounds that affiant has been diligent in securing such information and has reasonable ground to believe that such grounds exist; that it will take at least one week to complete such investigation and secure said affidavits.

Wherefore, defendants pray that the time within which to complete the filing of said motion for new trial with support affidavits to be extended one week from May 16, 1949.

WILLIAM L. PAUL, JR.

Subscribed and sworn to before me this May 16, 1949.

LOIS P. ESTEPP,

Deputy Clerk of the Court.

[Endorsed]: Filed May 16, 1949. [56]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Defendants having filed a motion for new trial on the 16th day of May, 1949, and the Court having denied a motion for additional time within which to file affidavits and additional grounds for said motion, and the motion for a new trial having thereafter come on for hearing, and the Court having heard the respective parties and the arguments presented on their behalf by their attorneys of record, and the Court having found from a determination of the issues presented by said motion that the same should be denied;

Now Therefore, It Is Hereby Ordered that the defendants' motion for a new trial be and the same is hereby denied.

Done in open Court this 20 day of May, 1949.

/s/ GEORGE W. FOLTA,
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 20, 1949. [57]

[Title of District Court and Cause.]

ORDER DENYING MOTION OF JUDGMENT
NOTWITHSTANDING VERDICT

The motion of the defendants for judgment notwithstanding verdict in the above-entitled action, having come on for hearing on May 20, 1949, and the Court having heard the argument on the motion as presented by the attorneys of record for the respective parties, and being fully advised in the premises;

It Is Hereby Ordered that said motion for judgment notwithstanding the verdict be, and the same is, hereby denied.

Done in open Court this 20th day of May, 1949.

GEORGE W. FOLTA,
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 20, 1949. [58]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR ADDITIONAL TIME WITHIN WHICH TO FILE ADDITIONAL GROUNDS AND SUPPORTING AFFIDAVITS IN SUPPORT OF MOTION FOR NEW TRIAL

The hearing on the motion of the defendants for additional time within which to file additional grounds and supporting affidavits in support of a motion for a new trial having come on for hearing before the Court on the 20th day of May, 1949, and the Court having heard the arguments on behalf of defendants and the arguments on behalf of plaintiff, as presented by the respective attorneys of record for the parties, and the Court being fully advised in the premises;

It Is Hereby Ordered that said motion filed by defendants for additional time within which to file additional grounds and supporting affidavits for a motion for new trial be, and the same is, hereby denied.

GEORGE W. FOLTA,
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 20, 1949. [59]

In the District Court for the Territory of Alaska
Division Number One at Juneau

No. 5996-A

JUNEAU SPRUCE CORPORATION, a Corpora-
tion,

Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, an Unincor-
porated Association, and INTERNATIONAL
LONGSHOREMEN'S & WAREHOUSE-
MEN'S UNION, LOCAL 16, an Unincorpor-
ated Association,

Defendants.

JUDGMENT

The above-entitled action having come on for jury trial on a second amended complaint of plaintiff under a stipulation made in open Court by the respective parties that the Answer and Affirmative Defense of the defendant International Longshoremen's & Warehousemen's Union, Local 16, and the Answer of the defendant International Longshoremen's & Warehousemen's Union, as made to the original complaint of the plaintiff, shall be considered and are the pleadings of the defendants to the second amended complaint of the plaintiff, and under a stipulation of the respective parties that the amended reply of the plaintiff shall be the

pleading to the Affirmative Defense of the defendant International Longshoremen's Union, Local 16;

And said trial having been concluded on May 13, 1949, with a verdict in favor of the plaintiff and against both defendants for the sum of \$750,000;

And the Court having denied the defendants' motions for judgment notwithstanding verdict and for a new trial;

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that the plaintiff be and it is hereby granted a judgment against the defendants International Longshoremen's & Warehousemen's Union and International Longshoremen's & Warehousemen's Union, Local 16, both unincorporated associations, in the sum of Seven Hundred Fifty Thousand (\$750,000.00) Dollars, together with the plaintiff's costs [60] and disbursements herein, to be taxed by the Clerk of the above-entitled Court. including an attorney's fee of Ten Thousand (\$10,000.00) Dollars.

Done in open Court this 20th day of May, 1949.

GEORGE W. FOLTA,
Judge.

Entered Court Journal No. 19 Pages 162-163.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 20, 1949. [61]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Juneau Spruce Corporation, plaintiff above
named, and its attorneys:

Notive is hereby given that defendants above
named hereby appeal to the United States Circuit
Court of Appeals for the Ninth Circuit from the
orders of the Court of May 20, 1949, overruling
defendants' motions for judgment for defendants
notwithstanding the verdict, for new trial, and for
additional time within which to file additional
grounds for motion for new trial together with
supporting affidavits, and from the judgment of the
Court of May 20, 1949, against defendants.

GEORGE R. ANDERSEN and

WILLIAM L. PAUL, JR.,
Attorneys for Defendants.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

Copy received June 9, 1949.

[Endorsed]: Filed June 9, 1949. [62]

[Title of District Court and Cause.]

PETITION FOR APPEAL

This Court having overruled defendants' motions
for judgment for defendants notwithstanding the
verdict, for new trial, and for additional time within

which to file additional grounds for motion for new trial together with supporting affidavits, and having made and entered its judgment against defendants, all on May 20, 1949; and

The above-named defendants, conceiving themselves aggrieved by the aforesaid orders and judgment of May 20, 1949, in this cause, do hereby appeal from said orders and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said orders and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and defendants further pray that the above-entitled Court fix the amount of a cost and/or supersedeas bond, and from the date of such determination allow defendants two weeks within which to secure and file such bonds.

This motion is based on the files and records of this cause.

GEORGE ANDERSEN and
WILLIAM L. PAUL, JR.,
Attorneys for Defendants.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 9, 1949. [63]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Come now the defendants above named and say that there is manifest error in the records, proceedings and judgment of May 20, 1949, and therefore submit the following general assignments of error, in this, to wit:

(1) That the verdict and judgment thereon are contrary to the evidence.

(2) That the evidence is insufficient to support a verdict against either defendant.

(3) That the Court and jury erred in permitting a recovery against the International Union for any alleged damages sustained prior to May 8, 1948.

(4) The verdict is contrary to the evidence in that no alleged damages should have been awarded against the International Union for any period prior to May 8, 1948.

(5) The verdict is against the evidence in that there was no evidence sufficient to hold the International Union liable for any alleged damages sustained by the plaintiff prior to May 8, 1948.

(6) The Court erred in admitting a mass of evidence, throughout the trial, which was objected to by the defendants as hearsay, which evidence was prejudicial to the rights of both defendants herein.

(7) The Court erred in refusing to permit defendant International Union to withdraw its demurrer for the purpose of attacking service upon the International Union through service upon Verne Albright.

(8) The Court erred in holding that the District Court for the Territory of Alaska had jurisdiction over the subject matter of this litigation under the Taft-Hartley Act, said Court not being a court of the United States within the meaning of said Taft-Hartley Act.

(9) Errors of law occurring at and during the course of the trial excepted to by the defendants are as follows:

(a) Plaintiff offered and gave evidence and exhibits, and the Court admitted the same over the objections of defendants that plaintiff had not assumed the collective bargaining contract between Juneau Lumber Mills and Local 16; whereas such evidence and exhibits are incompetent, irrelevant and immaterial and contrary to the parol evidence rule.

(b) Plaintiff offered and gave evidence and exhibits, and the Court admitted over the objections of defendants, parol evidence the purport and effect of which was to vary the terms of the contract of November 3, 1947. (Pltfs. Ex. #2.) [65]

(c) Plaintiff offered and gave hearsay evidence, and the Court admitted the same over objections of defendants, purporting to be evidence of members

of International Woodworkers of America, generally on all issues deemed by plaintiff to be material.

(d) Plaintiff offered in evidence and the Court admitted over the objections of defendants the constitution and by-laws of defendants, being plaintiff's exhibits Nos. 3 and 4, whereas the same are immaterial and irrelevant to the issues of law and fact in this controversy.

(e) Plaintiff offered testimony and the Court admitted over the objections of defendants that plaintiff had recognized IWA M-271 as the exclusive bargaining agent of its employees, whereas such testimony is immaterial, irrelevant and incompetent.

(f) Plaintiff offered testimony and exhibits of Verne Albright and John Barry as evidence of agency binding on defendant International Union, whereas such evidence is incompetent and irrelevant for any purpose, and no sufficient foundation was laid for its introduction.

(g) Plaintiff offered testimony and the court admitted the same over objections of defendants, by the witness Hawkins that plaintiff's mill would have had a certain future capacity, whereas such testimony is opinion testimony and the said witness was not qualified as an expert or shown to have had any familiarity with sawmill operation.

(h) Plaintiff offered testimony and the Court admitted the same over objections of defendants, by the witness Hawkins that longshoring is not a craft, whereas the said witness was not qualified as

an expert on such subject or shown to have any familiarity therewith, and such testimony was opinion, and incompetent.

(i) Plaintiff offered testimony and the Court admitted the same over objections of defendant by plaintiff's witness [66] Kirkham to vary the terms of a written document, namely the IWA minutes of April 1, 1948, and such evidence was incompetent, irrelevant and immaterial.

(j) The same with regard to the testimony of plaintiff's witness Flint.

(k) Plaintiff offered testimony and exhibits and the Court admitted the same over objections of defendants, by the witness Youngs hearsay testimony purporting to be that of Rockwell and Pilfold, and second-handed hearsay testimony through Rockwell and Pilfold of what it is purported Albright and Barry had said; and the same was incompetent and no sufficient foundation was laid for its introduction.

(l) Plaintiff offered testimony and exhibits and the Court admitted the same over objections of defendants by the witness Prawitz of what purported to be market prices of lumber but in the form of a compilation, but the said witness and plaintiff had failed and neglected to make available in any manner the things upon which such compilation was based, and thereby the defendants were denied the right of cross-examination of said witness, and his testimony was incompetent.

(m) Plaintiff offered testimony and the Court

admitted the same over objections of defendants, by the witness Schultz that members of Local 16 refused to handle plaintiff's lumber but such testimony was immaterial and irrelevant to any of the issues of the controversy and incompetent as hearsay; and also the witness testified based purely on hearsay regarding an alleged investigation as to whether lumber could or could not be unloaded in various other ports.

(n) Plaintiff offered testimony and the Court admitted the same over objections of defendants, by the witness Adams that members of Local 16 refused to handle plaintiff's lumber but such testimony was immaterial and irrelevant to any of the issues of the controversy.

(10) Errors of law occurring at the trial and excepted to by defendants, in this:

(a) Defendants offered Exhibit C generally, and Exhibit D for Identification generally, in evidence, and the testimony of the witness Pearson, all on the subject of offers made by Local 16 to bargain and its right to bargain generally with plaintiff, but the Court refused the same, although the same was a material issue in the controversy.

(b) The same with regard to offers of Local 16 to arbitrate and the duty of plaintiff to accept and/or initiate such arbitration in this controversy and in the matters out of which it arose, generally.

(c) The same with regard to the fact that plaintiff, after IWA M-271 refused to bargain concerning longshore work at plaintiff's plant.

(d) The same with regard to the fact that plaintiff never challenged the representation of Local 16 after IWA M-271 refused to bargain concerning longshore work at plaintiff's plant.

(e) The Court erred under the Taft-Hartley Act in not instructing the Jury as requested by the defendants that the IWA and ILWU could adjust work claims between themselves.

(f) That the said Taft-Hartley Act as applied to the facts of this case, in relation to trade unions adjusting work claims between themselves is unconstitutional and was unconstitutionally applied.

(11) Errors of law occurring at the trial, and excepted to by defendants, in this, that the Court failed and refused to instruct the jury as requested by defendants in their written instructions duly submitted to the Court and numbered one through thirteen and number fifteen, for the reasons stated in such [68] exceptions, and particularly as follows:

(a) Defendants' requested instruction No. 1 states the public policy of the Labor Management Relations Act, 1947, hereinafter called the "Acts," and is material on the issue of whether plaintiff created or maintained the events in controversy to such an extent that plaintiff should not be permitted to maintain this action; and further on the issue of whether plaintiff reasonably acted to mitigate its damages.

(b) Defendants' requested instruction No. 2, for reasons similar to those stated in paragraph (a) hereof; and for the further reason that said Act is

applicable only to the territorial limits of the United States and not to the Dominion of Canada.

(c) Defendants' requested instruction No. 3 states that persons or their representatives have a right to ask for work and crafts have a right to organize, either or both of which the jury could have found to be controlling, to define the actions or objections of defendants or defendant Local 16, and consequently a corresponding duty of plaintiff to bargain and/or arbitrate the controversy or its causes with defendant Local 16, and require a verdict for defendants.

(d) Defendants' requested instruction No. 4 states matters of law upon which the jury could have found on the evidence that plaintiff purposely created and maintained the events in controversy or failed and refused to mitigate its damages.

(e) Defendants' requested instruction No. 5 defines free speech, coercion and intimidation, all of which were issues of fact in evidence, to such an extent that the jury on the evidence would have found for defendants if they had been instructed as requested.

(f) Defendants' requested instruction No. 6 fully states the law of agency as the same was at issue, and thereby the jury would have returned a verdict for the defendant [69] International Union.

(g) Defendants' requested instruction No. 7 states the precision with which damages must be proved, and had the jury been so instructed it would have returned a verdict for defendants or at the most nominal damages for the plaintiff.

(h) Defendants' requested instruction No. 8 states the law of succession of labor contracts and also the law of adoption thereof, and the parties' mutual duties to bargain which would have flowed therefrom, and the jury would have found from the evidence that plaintiff was either successor to the Juneau Lumber Mills contract with defendant Local 16 or had adopted such contract, from either of which would have arisen the duty of plaintiff to bargain and/or arbitrate with defendant Local 16 over the events in controversy; and the plaintiff's failure and refusal so to do, would have required a verdict for defendants.

(i) Defendants' requested instruction No. 9 states the law relating to mitigation of damages, which, from the evidence, would have required the jury to return a verdict for defendants or at the most a verdict for nominal damages.

(j) Defendants' requested instruction No. 10 states the law with regard to whether plaintiff created and maintained the events in controversy upon which evidence the jury would have returned a verdict for defendants, since it was uncontroverted that plaintiff failed and refused to make use of its remedies provided in Section 9 of the Act.

(k) Defendants' requested instruction No. 11 states the law with regard to the creation and existence of a labor contract and its interpretation, and therefrom the jury could have found upon the evidence that there was a labor contract in existence covering longshore work between plaintiff and de-

fendant Local 16, which was a material point in issue, and the same was interpreted by all to cover longshore work; and found a verdict for defendants. [70]

(l) Defendants' requested instruction No. 12 states the policy of the Act regarding the creation of labor contracts and settlement of all labor controversies, upon which from the evidence the jury could have found that plaintiff failed and refused to fulfill its legal duties to bargain and to use the grievance settlement facilities of the federal government, and thereby would have returned a verdict for defendants.

(m) Defendants' requested instruction No. 13 states the policy of the Act and the effect thereof as stated in paragraph (l) hereinabove.

(n) Defendants' requested instruction No. 15 states the law and the effect thereof as mentioned in paragraph (e) hereof.

(12) Errors of law occurring at the trial, and excepted to by defendants, in this, that the Court instructed the jury as follows:

(a) In Instruction No. 4, the Court in paragraphs 1, 3 and 6 thereof stated the law of agency so narrowly as to confuse the jury and thus require them to return a verdict against defendant International Union.

(b) In Instruction No. 6, the Court instructed on the law of conspiracy, on which there was no issue of fact at all, and thereby the jury was confused and returned a verdict against defendants.

(c) In Instruction No. 11, the Court instructed the jury that Exhibit C was in evidence for a limited purpose only, whereas it was in evidence generally; and furthermore, it was in evidence on a material issue of fact whether a contract existed between Juneau Lumber Mills and Local 16 and between plaintiff and Local 16.

(13) Errors of law occurring at the trial and excepted to by defendants, in this, that the Court gave supplemental instructions to the jury after it had deliberated 21 hours, which [71] amounted to a direction to the jury to return a verdict for plaintiff without grounds therefor, and which said instructions incorrectly stated the law.

(14) Supplemental Instruction No. 2, in addition to being part of the directed verdict, erroneously instructed the jury that certain facts were admitted; whereas, the only purpose of the picketing as the evidence showed was to seek negotiations with the company.

(15) The Court erred in Supplemental Instruction No. 2 in erroneously stating to the jury that the International could be liable for damages sustained prior to May 8, 1948; whereas, no evidence was introduced tending to show or prove any act of the International prior to said date.

(16) The Court erred with respect to Supplemental Instruction No. 2 in erroneously stating to the jury that the International could be held liable for acts prior to May 8, 1948, if it assisted and

abetted Local 16 after May 8, 1948, which statement is contrary to the law and the facts.

(17) The Court erred in Supplemental Instruction No. 3 in that: First, the Court erroneously stated the law of ratification; secondly, erroneously stated the law with respect to agency; and thirdly, erroneously stated that there was no issue for the jury to decide as to Local 16.

(18) With respect to Supplemental Instruction No. 4, the instruction is an oversimplification in a statement of the law with respect to the case and finds no support in the evidence.

(19) The Court erred in Supplemental Instruction No. 5 in the manner following: First, the first paragraph of said instruction erroneously informed the jury that if the International participated in any manner in bringing about the refusal of Local 16 to work products, the Local and the International would be liable. That the words "in any manner" are entirely misleading [72] in relation to the facts of the case and erroneously stated the law. Secondly, that paragraph 2 of said instruction is erroneous in that it depends for validity upon the first paragraph which erroneously states the law to the jury.

(20) The Court erred in holding, in effect, that the said Act and the Court's interpretation of said Act with regard to the use of free speech and speech generally by Local 16 is constitutional and that it does not arbitrarily abridge the same.

(21) The Court erred in overruling defendant International Union's motion for a directed verdict.

(22) The Court erred in ruling that the affidavit of Albright introduced by plaintiff was not generally binding on plaintiff.

(23) The Court erred in overruling defendant Local 16's motion for a directed verdict.

(24) The Court erred in overruling at all, and in the manner and in the scope with which it did, defendants' motion for additional time within which to file additional grounds for motion for new trial and to file affidavits in support thereof in that defendants were wholly prevented from investigating whether the jury had followed the instructions of the Court and had not arrived at their verdict by unlawful means, such as agreeing among themselves in advance to be bound by a quotient verdict, a division among themselves of a consideration of respective portions of the evidence, and had not arrived at their verdict from passion or prejudice against defendants; and had arrived at their verdict from the evidence and not matters not in evidence.

(25) The Court erred in not allowing defendants' motion for judgment notwithstanding the verdict.

(26) The Court erred in not allowing defendants' motion for a new trial.

(27) The Court erred in rendering judgment for plaintiff without notice to defendants. [73]

(28) The Court erred in rendering judgment in favor of plaintiff and against the defendants or either of them.

Wherefore, defendants pray that the judgment may be reversed.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER.

WILLIAM L. PAUL, JR.,

HENRY RODEN,

By GEORGE A. ANDERSEN,
Attorneys for Defendant.

[Endorsed]: Filed June 9, 1949. [74]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL, FIXING COST
BOND AND SETTING TIME FOR SET-
TLEMENT OF BILL OF EXCEPTIONS

On this 9 day of June, 1949, this cause came on regularly to be heard upon the petition of the defendants above named for the allowance of an appeal on behalf of defendants from the judgment heretofore made and entered on May 20, 1949, rendering judgment for plaintiff in the sum of \$750,000 against both defendants herein and for fixing the amount of the cost bond on said appeal and for setting a time within which to settle a bill of exceptions; the Court being duly advised in the premises

does hereby find that said judgment is one from which appeal can be taken, the cost bond herein should be fixed in the sum of \$250.00, and 90 days allowed within which to settle a bill of exceptions.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the appeal of said defendants from said judgment be, and the same is hereby, allowed to the United States Court of Appeals for the Ninth Circuit; that a certified copy of the transcript of record, pleadings, proceedings and other necessary documents of this matter be transferred, duly authenticated, to the Clerk of the United States Court of Appeals for the Ninth Circuit at San Francisco, California; that the cost bond be and hereby is fixed in the sum of \$250.00; that ninety days be and hereby is allowed within which to settle the bill of exceptions.

Done at Juneau, Alaska, this 9 day of June, 1949.

GEORGE W. FOLTA,
Judge.

[Endorsed]: Filed June 9, 1949. [75]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents That We, International Longshoremen's and Warehousemen's Union and International Longshoremen's and Warehousemen's Union, Local 16, as principals, and

United States Fidelity & Guaranty Company as surety, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of June, 1949.

Whereas, lately at the District Court in the First Judicial Division at Juneau, in a suit pending between the above-entitled appellants and appellee, a judgment was rendered against the said appellants, and the said appellants having filed in said Court a Notice of Appeal, Petition for Allowance of Appeal, and Assignment of Errors, to reverse the judgment in the aforesaid suit on appeal to the United States Circuit Court of Appeals to be holden at San Francisco, State of California, on the 15 day of September, 1949, or at any time thereafter. (G. W. Folta.)

Now, the condition of the above obligation is such, that if the said appellants shall prosecute their appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if it fail to make its plea good, [76] then the

above obligation is void; else to remain in full force and virtue.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By GEO. ANDERSEN,
Attorneys for Defendant.

WILLIAM L. PAUL, JR.,
GEORGE ANDERSEN and
WILLIAM L. PAUL, JR.,

Attorneys for the Principals, International Longshoremen's and Warehousemen's Union and International Longshoremen's and Warehousemen's Union, Local 16.

.....,
Agent for U. S. Fidelity &
Guaranty Company.

UNITED STATES FIDELITY & GUARANTY
COMPANY,

[Seal] By M. E. MONAGLE,
Its Attorney-In-Fact.

Attest:

M. E. MONAGLE,
Its Agent.

[Endorsed]: Filed June 9, 1949. [77]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States to the Above-Named Plaintiff (Appellee), Juneau Spruce Corporation, and to N.R. Banfield of Faulkner, Banfield and Boochever, Its Attorneys, Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within forty days from the date of this writ, pursuant to an appeal, filed in the Clerk's Office of the District Court for the Territory of Alaska, Division Number One, at Juneau, wherein the above-entitled appellants are defendants and the above-entitled appellee is plaintiff, to show cause, if any there be, why the judgment in such appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Done at Juneau, Alaska, this June 9, 1949.

/s/ GEORGE W. FOLTA,
Judge.

Copy received June 9, 1949.

[Endorsed]: Filed June 9, 1949. [78]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above-Entitled Court:

You will please prepare transcript of record in the above-entitled cause, to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, upon the appeal heretofore perfected to said Court, and include therein the following papers and records, to wit:

(1) Second Amended Complaint.

(2) Special Appearance to Quash Service of Summons and Affidavit of Verne Albright attached thereto.

(3) Order of Court Denying Motion to Quash Summons.

(4) Demurrer of both defendants.

(5) Motion for Leave of International Longshoremen's and Warehousemen's Union to Withdraw Demurrer, together with Affidavit of Germain Bulcke attached thereto.

(6) Motion for Certificate.

(7) Motion for Certificate by Local 16.

(8) Order of Court Overruling Demurrer and Denying Motions.

(9) Answer and Affirmative Defense (Local 16).

(10) Minute Order of April 27, 1949, showing answers running against Second Amended Complaint and new allegations deemed denied.

- (11) Answer (International Union).
- (12) Reply (of plaintiff to affirmative defense of Local 16).
- (13) Defendants' requested instructions.
- (14) Instructions of Court. [79]
- (15) Motion for new trial.
- (16) Motion for Judgment for Defendants Notwithstanding the Verdict.
- (17) Motion for Additional Time Within Which to File Additional Grounds on Motion for New Trial.
- (17a) Orders of May 20, 1949, overruling motions mentioned in 15, 16 and 17 above.
- (18) Judgment.
- (19) Notice of Appeal.
- (20) Petition for Appeal.
- (21) Assignments of Error.
- (22) Order Allowing Appeal and Fixing Cost Bond.
- (22a) Cost Bond.
- (23) Citation.
- (25) Same as Praeipe.
- (26) Stipulation on Printing of Exhibits stipulated, and exhibits therein stipulated.—Not filed. P. M.
- (27) Praeipe.

This transcript is to be prepared as required by law and the rules and orders of this Court and the Court of Appeals for the Ninth Circuit, and is to be forwarded to said Court at San Francisco, California, on or before 40 days from the allowance of

appeal filed herein, to wit, the day of
....., 1949.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER.

WILLIAM L. PAUL, JR.,
HENRY RODEN.

By /s/ WILLIAM L. PAUL, JR.,
Attorneys for Defendants.

Dated: This day of, 1949.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 9, 1949. [80]

[Title of District Court and Cause.]

SUMMONS

To International Longshoremen's and Warehousemen's Union, and International Longshoremen's and Warehousemen's Union, Local 16, Defendants, Greetings:

In the Name of the United States of America, You, and each of you, are hereby commanded to be and appear in the above-entitled Court, holden at Juneau, in said Division of said Territory and answer the complaint filed against you in the above-entitled action, within thirty days from the date of the service of this summons and a copy of the said complaint upon you, and if you fail so to appear

and answer, for want thereof, the plaintiff.. will take judgment against you, and each of you, for the sum.. specified in said complaint, and will apply to the Court for the relief demanded therein, a copy of which said complaint is herewith served upon you, and which relief demanded is for judgment against each of you in the sum of \$193,000.00 and \$10,000.00 attorneys' fees and Plaintiff's costs and disbursements herein.

And you, the United States Marshal of Division No. 1 of the Territory of Alaska, or any Deputy, are hereby required to make service of this summons upon the said defendant.., and each of them, as by law required, and you will make due return hereof to the Clerk of this Court within forty days from the date of its delivery to you, with an endorsement hereon of your doings in the premises.

In Witness Whereof I have hereto set my hand and affixed the Seal of the above Court, at Juneau, Alaska, this 20th day of October, A. D. 1948.

J. W. LEIVERS,
Clerk.

By P. D. E. McIVER,
Deputy. [81]

[Title of District Court and Cause.]

RETURN ON SUMMONS

I Hereby Certify that the Summons in the above-entitled action dated October 20, 1948, attached hereto, was served upon the defendant International Longshoremen's and Warehousemen's Union, an Unincorporated association, on the 21st day of October, 1948, at Cordova, Alaska, by delivering a copy thereof and a copy of the complaint filed in the above-entitled action, both certified by N. C. Banfield as attorney for plaintiff as true copies of the respective originals, to Verne Albright in his capacity as agent and representative of said defendant.

Witness my hand at Cordova, Alaska, this 21st day of October, 1948.

JAMES H. PATTERSON,
U. S. Marshal.

By Mc E. EDMONDS,
Deputy.

[Endorsed]: Filed October 23, 1948. [82]

[Title of District Court and Cause.]

AMENDED REPLY

Comes now the plaintiff and in reply to the affirmative defense of the defendant, International Longshoremen's and Warehousemen's Union Local 16, the plaintiff admits and denies the allegations thereof as follows:

I.

Plaintiff admits the allegations of paragraph numbered 11 in said defendant's affirmative defense.

II.

Plaintiff admits the allegations of paragraph numbered 12 of said defendant's affirmative defense.

III.

Plaintiff admits the allegation contained in paragraph numbered 13 of said defendant's affirmative defense.

IV.

Plaintiff admits the allegations of paragraph numbered 14 in said defendant's affirmative defense.

V.

Plaintiff has insufficient knowledge regarding the statements made in paragraph numbered 15 of said defendant's affirmative defense to form a belief regarding the same and therefore denies each and every allegation of said paragraph except that plaintiff specifically denies that Local 16 has been

or now is a party to a collective bargaining agreement with all employers engaged in business along the waterfront in Juneau, Alaska, and further denies that members of Local 16, since the commencement of its operations, have been employees of the company by virtue of said agreement. [83]

VI.

Plaintiff denies the allegations contained in paragraph numbered 16 of said defendant's affirmative defense.

VII.

Plaintiff admits the allegations of paragraph numbered 17 of said defendant's affirmative defense except that plaintiff denies that the employees assigned to load lumber aboard said barges usually worked in a different appropriate collective bargaining unit than the one to which the members of Local 16 belonged, denies that the members of Local 16 were ever its employees, and denies that Local 16 constituted an appropriate bargaining unit of plaintiff's employees.

VIII.

Plaintiff admits the allegations of paragraph numbered 18 of said defendant's affirmative defense except that plaintiff denies that the assertion to the company alleged in said paragraph was made with the acquiescence and consent of I.W.A. Local M-271.

IX.

Plaintiff admits the allegations contained in para-

graph numbered 19 of said defendant's affirmative defense.

Wherefore, plaintiff prays that said affirmative defense be dismissed and held for naught, and that plaintiff be given relief as prayed for in plaintiff's complaint.

FAULKNER, BANFIELD &
BOOCHEVER.

By N. C. BANFIELD,
Of Counsel for Plaintiff.

United States of America,
Territory of Alaska—ss.

I, Freeman Schultz, of Juneau, Alaska, being first duly sworn on oath according to law, depose and say:

I am the executive vice-president of Juneau Spruce Corporation, and its manager; I have read the foregoing complaint, know its contents, and the facts stated therein are true and correct as I verily believe.

/s/ FREEMAN SCHULTZ.

Subscribed and sworn to before me this 25th day of April, 1949.

[Seal] /s/ N. C. BANFIELD,
Notary Public for Alaska.

My Commission expires Aug. 21, 1950.

Receipt of Copy attached.

[Endorsed]: Filed April 27, 1949. [84]

[Title of District Court and Cause.]

VERDICT No. 1

We, the Jury, duly impanelled and sworn to try the above-entitled cause, find for the plaintiff and against both defendants and assess plaintiff's damages in the sum of \$750,000.00.

Dated at Juneau, Alaska, this 13th day of May, 1949.

E. K. GUERIN,
Foreman.

[Endorsed]: Filed May 13, 1949. [85]

[Title of District Court and Cause.]

COUNTER-PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please prepare transcript of record in the above-entitled cause, to be filed in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, by including therein, in addition to the papers and records designated by defendants in their "Praecipe for Transcript of Record," the following additional papers and records, to wit:

(1) Summons.

(2) Return on Summons dated October 21, 1948, showing service on defendant International Long-

shoremen's and Warehousemen's Union by service upon Verne Albright.

(3) Plaintiff's Amended Reply to Answer of Defendant ILWU Local 16.

(4) Verdict.

(5) Counter-Praecipe—P. M.

Dated this 13th day of June, 1949.

FAULKNER, BANFIELD &
BOOCHEVER.

By /s/ N. C. BANFIELD,
Of Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 14, 1949. [86]

[Title of District Court and Cause.]

SUPPLEMENTAL COUNTER-PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please prepare transcript of record in the above-entitled cause, to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, by including therein in addition to the papers and records designated by defendants, in their "Praecipe for Transcript of Record" and "Supplemental Praecipe," and in addition to the papers and records designated in plaintiff's "Coun-

ter-Praecipe," the following additional papers and records, to wit:

1. Plaintiff's Exhibit 2, being Agreement dated November 3, 1947: From the beginning on Page 1 to the end of Article II, all of Article XIII, all of the closing or last paragraph and the signatures.

2. Plaintiff's Exhibit 3, being the Constitution of the International Longshoremen's and Warehousemen's Union: The following portions thereof:

Title Page.

Preamble.

All of Article I, referring to the name of the Union.

All of Article III, referring to the objects of the Union.

All of Article IV, referring to the jurisdiction of the Union.

All of Article V, referring to the powers and duties of local Unions.

Portions of Article VI, referring to officers: Only Sections 1, 3, 4 and 12. [208]

Portions of Article IX, with reference to the per capita tax and assessments: Only Sections 1, 4 and 5.

Portions of Article X, referring to conventions: Only Sections 3, 4 and 7.

Portions of Article XI, referring to charters: Only Sections 1 and 4.

Portions of Article XII, referring to agreements, strikes, etc.: Only Sections 1 and 2.

All of Article XIV, referring to absorption of

members on dissolution of Local.

All of Article XV, referring to referendum votes.

All of Article XVI, referring to withdrawals.

All of Article XVII, referring to transfers.

All of Article XVIII, referring to visiting members, etc.

All of Article XX, referring to union newspaper.

3. Plaintiff's Exhibit 5, being a letter to Mr. E. S. Hawkins from Geo. Schmidt: Only the date, salutation, last paragraph, closing and signature.

4. Plaintiff's Exhibit 11, letter from Pacific Stevedoring and Contracting Company, Ltd., dated August 31, 1948: All of said letter.

5. Plaintiff's Exhibit 14, Juneau Spruce Corporation's financial statement, 28 pages: All of said exhibit.

6. Plaintiff's Exhibit 15, consisting of 18 pages, regarding loss of profits: All of said exhibit.

7. Plaintiff's Exhibit 16, being numerous photographs: All of said photographs.

8. Plaintiff's Exhibit 17, being a statement in Alaska Sunday Press dated June 6, 1948: The heading and date of paper as it appears on Page 8 and that part of an article published on Page 8 commencing on Line 12 of Column 1 of Page 8 and ending at the end of the article.

9. Plaintiff's Exhibit 18, Statement of Mr. Wukich, given to Mrs. Pegues for publication: All of said exhibit. [209]

10. Plaintiff's Exhibit 20, Decision of National Labor Relations Board: All of said exhibit.

11. Plaintiff's Exhibit 24, being a copy of an issue of the Dispatcher, dated September 17, 1948: The heading and date as the same appear on Page 6 and all of the article on Page 6 under the title "Unfair Charges."

12. This Supplemental Counter-Praecipe.

Dated this 13th day of March, 1950.

FAULKNER, BANFIELD &
BOOCHEVER.

By /s/ N. C. BANFIELD,
Of Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 14, 1950. [210]

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

Defendants-appellants herewith present as their bill of exceptions the entire transcript of testimony (except voir dire, and opening and closing statements of counsel) taken at the trial of this cause, and pray the same be settled and allowed.

Dated April 11, 1950.

/s/ WILLIAM L. PAUL, JR.,
Of Attorneys for Appellants.

No objection as to form. April 11, 1950.

N. C. BANFIELD,
Of Attorneys for Appellee.

ORDER

The foregoing Bill of Exceptions is correct and is hereby settled, allowed and approved.

April 13, 1950.

/s/ GEORGE W. FOLTA,
Judge.

[Endorsed]: Filed April 13, 1950. [211]

[Title of District Court and Cause.]

SUPPLEMENTAL PRAECIPE

You will please prepare transcript of record in this cause, to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, upon the appeal heretofore perfected to said court, and include therein the following additional papers and records, to wit:

1. Bill of Exceptions filed April 11, 1950.
2. Order of allowance of same.
3. This supplemental praecipe.

This transcript is to be prepared as required by law and the rules and orders of this court and the said Court of Appeals, and is to be forwarded to said court at San Francisco on or before May 10, 1950.

/s/ WILLIAM L. PAUL, JR.,
Of Attorneys for Appellants.

Copy mailed to appellee's attorneys at Juneau, Alaska, April 11, 1950.

[Endorsed]: Filed April 11, 1950. [212]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 5996-A

JUNEAU SPRUCE CORPORATION, a Corporation,

Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, an Unincorporated Association, and INTERNATIONAL
LONGSHOREMEN'S & WAREHOUSE-
MEN'S UNION, LOCAL 16, an Unincorporated Association,

Defendants.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 27th day of April, 1949, at 2:00 o'clock p.m., at Juneau, Alaska, the above-entitled cause came on for trial before a jury, the Honorable George W. Folta, United States District Judge, presiding; the plaintiff appearing by Norman Banfield and Manley B. Strayer, of its attorneys; the defendant International Longshoremen's & Warehousemen's Union appearing by George R. Andersen, of its attorneys, and the defendant International Longshoremen's & Warehousemen's Union, Local 16, appearing by William L. Paul, Jr., Henry Roden and George Andersen, its attorneys; both sides having announced they

were ready to proceed; empanelling of a jury was commenced and the jury, having been duly admonished by the Court before and after subsequent recesses and adjournments, was duly sworn to try the cause on the 28th day of April, 1949, the trial having reconvened at 2:00 o'clock p.m. with all parties present as heretofore; and

Thereupon, a motion by Mr. Paul for the exclusion of witnesses was allowed by the Court with the qualification that each party might have one witness of their choice remain and that each party would see that the order would be obeyed; Mr. Strayer made the opening statement to the jury in behalf of the plaintiff; Mr. Paul made the opening statement to the jury in behalf of the defendant International Longshoremen's & Warehousemen's Union, Local 16; Mr. Andersen made a supplemental opening statement to the jury in behalf of the defendant International Longshoremen's & Warehousemen's Union; and thereafter it was stipulated between the parties that the International Longshoremen's & Warehousemen's Union is a labor organization; and counsel for the plaintiff requested counsel for the defendants to provide copies of the constitution of the International Longshoremen's & Warehousemen's Union and of the International Longshoremen's & Warehousemen's Union, Local 16, and the names of the officers of the International Longshoremen's & Warehousemen's Union and of the International Longshoremen's & Warehousemen's Union, Local 16, and counsel

for the defendants stated they would check on those matters.

Whereupon, the trial proceeded as follows: [2*]

EUGENE S. HAWKINS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Will you state your full name?

A. Eugene S. Hawkins.

Q. Did you occupy any position with the Juneau Spruce Corporation?

A. Yes; as General Manager.

Q. During what time were you General Manager? A. May 1, 1947, to June 1, 1948.

Q. And during that time were you a director of the corporation? A. Yes.

Q. Did you hold any other title?

A. No.

Q. Let me ask you if you remember whether you were Vice President at any time?

A. Yes.

Q. During that whole period? A. Yes.

Q. Mr. Hawkins, were you here when the Juneau Spruce Corporation was incorporated?

A. Yes.

Q. And for what purpose was it incorporated?

Mr. Paul: Your Honor, I think the articles of

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Testimony of Eugene S. Hawkins.)

incorporation would show the purpose of the corporation, and the articles of incorporation would be the best evidence.

The Court: Objection overruled.

A. To produce and manufacture lumber.

Mr. Andersen: Let the record show the objection of either one is the objection of all.

The Court: Yes.

A. To produce and manufacture lumber in the Territory of Alaska, and the sale of such.

Q. Did the Juneau Spruce Corporation purchase any equipment or properties with which it could engage in that business? A. Yes.

Q. What did it purchase?

A. A sawmill, remanufacturing and retail yards located in Anchorage, Fairbanks and Juneau, and a logging camp and logging equipment located in Edna Bay and other places in Southeastern Alaska.

Q. Up at Fairbanks what did the Corporation buy up there?

A. A sawmill and retail yard and buildings and equipment there.

Q. And what did it buy at Anchorage?

A. A retail yard, buildings and equipment.

Q. Now, the operations at Fairbanks, by whom and under what name was that operation conducted prior to the purchase by [4] the Juneau Spruce Corporation?

A. The Independent Lumber Company.

Q. And what was the Independent Lumber Company?

(Testimony of Eugene S. Hawkins.)

A. The Independent Lumber Company was a partnership owned by Roy Rutherford and Roy Ferguson.

Q. Now, what was the—who owned the retail yard at Anchorage?

A. The Juneau Lumber Mills.

Q. And the sawmill here, will you describe the physical layout of the properties in Juneau; that is, where they are and the extent that was purchased?

A. Well, they cover—they are within an area of about three miles in the vicinity of Juneau. Eleven hundred feet of waterfront and dock on South Franklin, and log storage areas north and south of Juneau and across the channel.

Q. And now, tell us what was included as the main parts of the sawmill property at Juneau.

A. A sawmill, and remanufacturing and retail yard.

Q. What do you mean by remanufacture, Mr. Hawkins?

A. That includes everything with the exception of the actual sawing of the logs. There is no breakdown at any definite point.

Q. You mean, if it is cut into a smaller size and planed, that is what you call remanufacturing?

A. Yes.

Q. Was there a retail yard at Juneau? [5]

A. Yes.

Q. Who owned the properties at Juneau?

(Testimony of Eugene S. Hawkins.)

A. The Juneau Lumber Mills, Incorporated?

Q. And purchased by the Juneau Spruce Corporation from the Independent Lumber Company at Fairbanks and the Juneau Lumber Mills, Incorporated, at Juneau? A. That is right.

Q. Was there a written agreement under which that was taken over? A. Yes.

Q. I will ask you if this is the agreement?

Mr. Andersen: May we see it, please?

A. Yes. Yes, it is.

(The document was handed to counsel for defendants.)

Mr. Andersen: Rather than clutter the record, do you want a stipulation?

Mr. Banfield: We want it in evidence. I would like to have this marked for identification.

The Court: Can't you have it marked as an exhibit?

Mr. Banfield: Yes, I will offer it as an exhibit.

The Court: There is no use having it marked first for identification.

Mr. Banfield: I would like to offer this document as Plaintiff's Exhibit in Evidence.

The Court: If there is no objection, it may be received [6] as Plaintiff's Exhibit No. 1.

Mr. Banfield: I might call the Court's attention—there is an exhibit marked Exhibit No. 1. It was not in this case.

The Court: I assume the legend on it would show it was not received in this case. If it is re-

(Testimony of Eugene S. Hawkins.)

ceived later on, it will be appropriately marked, and then it couldn't be confused.

Clerk of Court: It has been marked Plaintiff's Exhibit No. 1.

Mr. Banfield: I would like to call the jury's attention to certain portions of the agreement at this time. "This agreement made this 30th day of April, 1947, by and between Juneau Lumber Mills, Inc., a corporation organized under the laws of Alaska, and Independent Lumber Company, a co-partnership consisting of Roy Rutherford and Roy Ferguson doing business at Fairbanks, Alaska, collectively called 'First Party' herein, and Juneau Spruce Corporation, a corporation organized under the laws of Alaska, hereinafter called 'Second Party.'" It provides: "First party agrees to execute and deliver to second party, its successors and assigns, a deed conveying to second party all real and personal property of whatsoever nature and wheresoever located owned by it or in which it has any interest at the time of executing this agreement on April 30, 1947, at 5:00 p.m., excepting moneys on hand, in banks, or accounts, bills or notes receivable and owing to [7] first party included but not limited to the following: The sawmill, yards, and properties of first party at Juneau"—then it goes on—I think counsel will not object—and includes boats, logging camp and various equipment, and that the possession of this property will be given to the Juneau Spruce Corporation April

(Testimony of Eugene S. Hawkins.)

30, 1947, with a quitclaim deed, and various terms regarding the price here, which is computed on a formula of \$595,000.00 plus the cost of inventories and the cost of unprocessed logs and the cost of merchandise on hand and supplies and certain equipment, etc., all of which had to be added after the inventories were taken. "All operations up to the close of business on April 30, 1947, shall be for the account of first party and all operations after that date shall be for the account of second party." Then it says, "It is mutually understood and agreed that first party was unable to complete and to deliver" a deed, and it would be done later, and a certain amount of money would be withheld, and the transfer of the actual documents would take place later. Now, it states here that the "First party agrees that," that is Rutherford and the Juneau Lumber Mills and Ferguson, "to the extent it is able to do so, it will make available, transfer and assign unto second party all private and governmental contracts and contract rights, unfilled orders, leases, permits, easements and other rights and privileges possessed by or used by first party or Juneau Logging Company or Juneau [8] Motorship Company," those being subsidiary companies mentioned in the agreement, "in connection with the businesses now or heretofore operated by them, in so far as the same may be necessary or convenient, for the use of second party in continuing the business heretofore carried on by first party,

(Testimony of Eugene S. Hawkins.)

Juneau Logging Company or Juneau Motorship Company.” There are certain conveyances regarding liabilities and insurance policies, and then it is stated: “It is expressly understood that first party is not assigning to second party and second party is not accepting or assuming any collective bargaining or labor agreements which may exist between first party and its employees except with respect to the return transportation fare above noted.” That was a former provision. Mr. Rutherford advanced money when they brought the men up, and they would agree to pro-rate that fare. “And that second party does not assume and shall not be responsible for any claims or demands for wages, back pay, over-time, travel time, social security industrial accident compensation or other claims of employees arising out of first party’s operations prior to the close of business on April 30, 1947.” In witness whereof, the parties executed the agreement.

Mr. Andersen: May it please the Court, we assumed it was a simple transfer, and I want to object to the—that is, a transfer of property from one to the other—we object to any self-serving part, and whether contracts were kept or taken [9] over as a matter of fact, cannot be shown by this document as to that.

The Court: It seems to me that ground is rather untenable. It was at a time before there would be anything self-serving or the making of a declaration.

(Testimony of Eugene S. Hawkins.)

Mr. Andersen: That is between the parties—Juneau Spruce and Juneau Lumber. The agreement was between them. But I object. It has no binding on us. It is a document to which we are not a party, and we are not bound by any provision. That is the basis.

The Court: There is no statement that it is for that purpose. I assume it is to show the extent of the operations and properties of the plaintiff.

Mr. Andersen: That is what I assumed it was.

The Court: I don't know of any other purpose—and perhaps the purpose to show they didn't take over any labor contracts.

Mr. Banfield: Yes, sir. For the purpose of showing exactly what kind of a deal this was, to show the transfer of physical assets and certain leases and permits and orders that people had placed for lumber, but nothing in labor contracts or accounts receivable, or nothing of that nature. The contract speaks for itself, and Mr. Hawkins will be questioned as to whether or not the agreement was carried out. We offer it for the purposes of all it shows. [10]

The Court: Objection is overruled. You may proceed.

Q. Mr. Hawkins, was the transfer of these properties and the take over by the Juneau Spruce Corporation carried out in the manner specified in this contract of April 30th?

Mr. Andersen: I object as calling for a conclu-

(Testimony of Eugene S. Hawkins.)

sion and opinion of the witness unless some foundation is laid, may it please the Court.

The Court: It doesn't seem to call for a conclusion. He can be asked if he knows.

A. Yes.

Q. You were the active General Manager of the plaintiff after April 30th? A. Yes.

Q. You know what was done and wasn't done to live up to this contract? A. Yes.

Q. And you know that all terms of this contract were carried out? A. Yes.

Mr. Andersen: I object. The questions are leading.

The Court: They may be leading, but it is pretty difficult to state, without taking a great deal of time, in any other form. I think the question has been answered.

Mr. Andersen: Answered twice, I think. [11]

Q. Now, did the Juneau Lumber Mills, Incorporated, continue—I might ask you this. Did Mr. Rutherford continue to stay in Juneau any time thereafter, after this take over? A. Yes.

Q. What was he doing here and for how long?

A. He was taking care of the business of his corporation.

Mr. Andersen: I am going to object. It is incompetent, irrelevant and immaterial, may it please the Court.

The Court: It is pretty difficult to say at this stage whether it is or not. I assume it is preliminary.

(Testimony of Eugene S. Hawkins.)

Mr. Banfield: It is, your Honor. I would like to have the man geographically placed so I can show the witness was in communication with him and then develop what we wish to between the parties.

The Court: Objection is overruled.

Q. How long did Mr. Rutherford continue here during that time?

A. As near as I can recall, about two months.

Q. Let me ask you—where did he spend most of his time?

A. At his bookkeeper's or—I don't know what all he was besides bookkeeper—it wasn't at the plant.

Q. Wasn't at the plant?

A. Wasn't at the plant.

Q. Did you talk to Mr. Rutherford from time to time after this take over?

A. Yes; very frequently. [12]

Q. Did you talk to him before the take over?

A. Yes.

Q. Did you have any conversations with Mr. Rutherford before the take over as to what unions were doing the work in and around the mill?

A. Yes.

Q. What did he tell you?

Mr. Andersen: I object to that as hearsay, may it please the Court.

The Court: Yes; I think it is hearsay.

Q. Now, Mr. Hawkins, when you took over the

(Testimony of Eugene S. Hawkins.)

mill there, what did you do with respect to hiring employees?

A. Well, we worked out a formula with Mr. Rutherford and posted notices in the mill whereby all former employees of the Juneau Lumber Mills who desired to work for the Juneau Spruce Corporation could sign up in the office on the first day of May, or the first day—I don't recall if that was a Sunday or not.

Mr. Andersen: May it please the Court, from the witness' answer, if there is something in writing, I am going to object to this as not the best evidence.

The Court: He isn't questioned as to the contents of any writing, so I think your objection is premature.

Mr. Andersen: I thought he was.

The Court: He was asked as to what was done.

Q. You say you posted notices in the mill?

A. Yes.

Q. Who posted notices in the mill?

A. Both the Juneau Spruce Corporation and the Juneau Lumber Mills.

Q. And how long did you stay on there as Manager after the take over?

A. Until June 1, 1948.

Q. Did you retain any copies of these notices that were posted?

A. No; not that I know of.

Q. Do you have any knowledge of how long they remained posted?

(Testimony of Eugene S. Hawkins.)

A. They were never taken down, only through the process of repairing the mill and being brushed off. No effort was made to take them down.

Q. Were there notices there when you ceased to be Manager?

A. I don't recall of seeing any there at that time.

Q. Now, Mr. Hawkins, what was the effect of this notice?

Mr. Andersen: I think that calls for the witness' conclusion, and I object on that ground.

The Court: As I understand it, these notices are not available now?

Q. Are these notices available?

A. Not to my knowledge.

The Court: Or copies of them? [14]

A. Not to my knowledge.

Mr. Andersen: I submit the objection is good. The witness doesn't know. Apparently he hasn't been here since that time.

The Court: I was about to ask if anybody else knows if they are available or copies of them. What about their availability, or copies, so far as your other witnesses are concerned?

Mr. Banfield: The persons we have had search have been unable to find any.

The Court: Objection is overruled. You may proceed.

Q. Mr. Hawkins, what did the notice of the Juneau Lumber Mills, Incorporated, state?

(Testimony of Eugene S. Hawkins.)

A. It stated that the Juneau Lumber Mills, Incorporated, had sold out their assets to the Juneau Spruce Corporation effective midnight April 30th, and their employment would cease as of that time.

Q. What did the notice of the Juneau Spruce Corporation state?

A. That the Juneau Spruce—the new owners of the Juneau Lumber Mills—office would be open for the signing up of employees, of all former employees, on that specific day, and the mill wasn't operated that day.

Q. What day was that to the best of your recollection?

A. May 1st, to the best of my recollection.

Q. If May 1st was a Sunday, would it have been May 2nd? [15]

A. It would have been May 2nd.

Q. Was there two days of no operation?

A. Yes.

Q. What was the purpose of no operation?

A. To give the men time to be signed up and established on the records of the Juneau Spruce Corporation as such.

Q. Did any longshoremen sign up?

A. Not that I recall; none that I know of.

Q. Let me ask you at this time, Mr. Hawkins, did the Company at any time in hiring men inquire as to whether or not a man belonged to a union?

A. No.

Q. Did it make any difference to the Company whether they did or not?

A. No.

(Testimony of Eugene S. Hawkins.)

Q. Has the Company ever employed any persons who happened to be member of the I.L.W.U. as regular employees of the mill?

Mr. Andersen: To which company do you refer, counsel?

Mr. Banfield: Juneau Spruce.

A. I don't know of a specific case. It could have happened. We didn't inquire. Any employee who requested employment was employed when there was a vacancy for same.

Q. The men who signed up there, were they all members of some [16] union?

A. No, I wouldn't say they were all members of some union.

Q. Do you know that from talking with the men that didn't belong to any union? A. Yes.

Mr. Andersen: That calls for a conclusion and opinion of the witness, may it please the Court.

The Court: He was asked whether he knew.

Mr. Andersen: Well, of course, if you ask a person whether he knows, that throws the door wide open to his conclusions, and, as a short time ago a judge characterized as the most dangerous question that can be asked a witness, it calls for his conclusion when he is allowed to state whether he knows. The question obviously calls for his conclusion.

The Court: If it calls for a conclusion, you can cross-examine him on it, but in the meantime it doesn't seem necessarily to be a conclusion or expression of opinion. There are a lot of answers that

(Testimony of Eugene S. Hawkins.)

certainly would fall within that class as being opinions. For instance, a witness is allowed to state what speed a car was going.

Mr. Andersen: That is a well-known exception to the rule.

The Court: This may be an exception too. In any event it isn't one of the issues, as I see it. Objection is overruled. [17]

Q. Mr. Hawkins, did you have any negotiation with any union of which the members worked at the plant after May 1st? A. Yes.

Q. What union was that? A. I.W.A.

Q. What was the local, do you remember?

A. M-271, I believe.

Q. How did that meeting come about; what was said and done?

A. Well, shortly after the take over we—a committee of the I.W.A. come to the office and requested that we negotiate a contract, and in as much as——

Mr. Andersen: May it please the Court, this is all hearsay.

The Court: It isn't hearsay yet. He said "negotiated."

Mr. Andersen: He said they came and wanted to do thus and so.

The Court: Acts; not what anybody said. The testimony is that they came and did something. That is not hearsay.

Mr. Andersen: I understood the witness said

(Testimony of Eugene S. Hawkins.)

they came and wanted to do thus and so. Obviously it is hearsay, the witness' characterization. I don't want to appear captious.

The Court: So far as the one word he mentioned—"wanted"—it could be hearsay. While it is desirable to skip [18] over that and ask him what was done, these are rather more or less, it seems to me, unimportant details.

Q. Mr. Hawkins, after this committee called on you, what was done at the meeting?

A. I told them that whenever they——

Mr. Andersen: Again, may it please the Court, it is hearsay, so far as both defendants are concerned.

The Court: Yes. He is not answering the questions by testifying what was done but is attempting to say what was said.

Q. Mr. Hawkins, you are not permitted to testify as to what someone else said to you a certain time. You can only tell what was done and what the gist of the conversation was, in other words, what transpired at this meeting and the purpose of it. Now, what was the purpose of this meeting so far as the Juneau Spruce Corporation was concerned?

A. It is a little bit difficult to describe that without saying what I said and what they said and what we agreed upon.

Q. What was agreed?

A. It was agreed——

Mr. Andersen: And again, may it please the

(Testimony of Eugene S. Hawkins.)

Court, it is a conclusion what was agreed upon. The agreement would be the best evidence.

The Court: He merely said they agreed. [19]

Mr. Andersen: And still it is hearsay so far as we are concerned. In another sense it is not admissible. This is not a controversy with the I.W.A. The I.W.A. is not concerned in this case, as I read the pleadings. If it is not hearsay, I still think it is not admissible, may it please the Court, and, if there was an agreement, it must be in writing and that is the best evidence.

The Court: I thought the I.W.A. was alleged to be the certified bargaining agent.

Mr. Andersen: No, your Honor.

Mr. Banfield: We made an opening statement that there were certain agreements and on November 3rd we made a written agreement. These culminated in the written agreement. Counsel knows they were verbal.

Mr. Andersen: Sorry; I don't know that.

Mr. Banfield: I could take a lot of time and say, "Was it written?" He would say, "No." I would ask, "Was it verbal?" He would say, "Yes." And then I would ask, "What was the verbal agreement?" It is perfectly competent to testify what was the agreement verbally and——

Mr. Andersen: That is only hearsay.

Mr. Banfield: To call it hearsay, both sides agreed to hearsay; and that is ridiculous.

Mr. Andersen: I don't believe what I say is

(Testimony of Eugene S. Hawkins.)

ridiculous. I don't want to appear ridiculous or say anything [20] ridiculous. I assume there is a written agreement. May it please the Court, if there was a written agreement that gets it out of hearsay. Then again there is the objection of immateriality. I make both. He apparently wants the witness to testify what was agreed upon at some meeting. Obviously the agreement is his conclusion and also hearsay and also immaterial.

The Court: How would you prove an oral agreement?

Mr. Andersen: By the best evidence; by the parties. But we are not a party to that agreement.

The Court: It might be collateral matter, but it is part of the plaintiff's case. Objection is overruled.

Q. Mr. Hawkins, was it a verbal or written agreement to which you testified?

A. Verbal.

Q. What was the agreement?

Mr. Andersen: Pardon me. Can't I have the date, please?

Mr. Banfield: He said shortly after the take over.

A. That I would negotiate a contract with them when they had shown evidence they represented a majority of the employees that we had.

Q. Was there any agreement made as to how soon they would do this?

Mr. Andersen: The same objection, your Honor.

(Testimony of Eugene S. Hawkins.)

A. As soon as possible.

Mr. Banfield: When there is an objection, you have to wait.

The Court: The same ruling.

Q. Did they claim at that time to represent all the employees in the plant; I mean, did they claim that all the employees in the plant were members of this union, or just part?

A. They claimed the majority.

Q. And did they later prove to you that a majority of the employees of the plant were members of I.W.A., M-271?

A. Yes.

Mr. Andersen: The same objection, may it please the Court; what the union was proving to this man, and now again this gentleman's conclusion.

The Court: Could you not attain the same purpose by just asking him what was done?

Mr. Banfield: Yes.

A. We were presented with signed slips authorizing pay roll deductions to be paid to the I.W.A. from a majority of the employees on record as employees of that date and thereby established the fact they represented the majority of the employees there.

Q. Now, thereafter, Mr. Hawkins, in dealing with the I.W.A. how did you recognize them, or what did you recognize them to be? [22]

A. Exclusive bargaining agent.

Q. For whom?

(Testimony of Eugene S. Hawkins.)

A. For all Juneau Spruce employees.

Q. And tell me, after that when did you have meetings with the I.W.A., or did you have any?

A. Yes.

Q. When were they?

A. It was very shortly after that that they brought in an agreement which they had drawn up, and I told them I would read it and consider it at the earliest possible date and give them an answer.

Q. Did it take them very long to get these slips that you spoke of? A. No.

Q. What happened after that with regard to this agreement with the I.W.A.?

A. We talked several times about the provisions in it. It was revised and changed several times, and ultimately I sent—they sent a copy to their International, and I sent a copy to Mr. Card of Coos Bay, and then it was sent back to the International again and finally signed up on November 3rd.

Q. Signed on November 3, 19——

A. 1947.

Q. 1947. I will ask you, Mr. Hawkins, if this is a copy of [23] the agreement you stated was signed on November 3, 1947? A. Yes; this is it.

Mr. Andersen: It may go in subject to the same general objection.

The Court: The record may show the same objection and the same ruling.

Mr. Andersen: Yes, your Honor.

(Testimony of Eugene S. Hawkins.)

Mr. Banfield: We offer the agreement as an exhibit.

The Court: It may be admitted as Plaintiff's Exhibit No. 2.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit 2.

Mr. Banfield: This agreement provides in part as follows: "The general purpose of this Agreement is in the mutual interest of the Employer and the employees to provide for the operation of the plant hereinafter mentioned, under conditions which will further to the fullest extent possible the safety of the employees, economy of operation, quality and quantity of output, elimination of waste, cleanliness of the plant and protection of property. It is recognized by this Agreement to be the duty of the Employer and employees to cooperate fully, individually and collectively, for the advancement of said conditions.

"Whereas, the parties hereto desire to establish the standards of hours of labor and other conditions under which [24] the employees shall work for the Employer during the term of this Agreement and desire to regulate mutual relations between the parties hereto:

"Now, Therefore, this Agreement is made and entered into this 3rd day of November, 1947, by and between the Juneau Spruce Corporation, Juneau, Alaska, hereinafter designated as the Employer, and Local M-271, International Woodworkers of

(Testimony of Eugene S. Hawkins.)

America, Juneau, Alaska, hereinafter designated as the Union.

“Witnesseth:

“That in consideration of the mutual promises and understandings made in good faith both parties hereby agree to and with each other, to-wit:

“Article I—Union Recognition

“The Union is hereby recognized as the sole and exclusive collective bargaining agent for all the employees of the Employer in its sawmill, manufacturing and retail departments at Juneau, Alaska, excluding superintendents, foremen and office employees, on all matters pertaining to wages, hours of labor and other conditions of employment in the aforesaid plant, subject to the provisions of Article II as provided in this Agreement.”

This agreement goes on and sets up a Shop Committee to deal with the employer, and provides for a method of settling disputes whereby, “Any employee or group of employees having a grievance against the Employer may present his or their complaint [25] to his or their foreman, who shall attempt to settle the grievance or dispute amicably and promptly. It is understood that any settlement arrived at shall not be inconsistent with the terms of this Agreement, and further that the Union representative shall be given opportunity to be present at such conference.” “In the event that machinery provided in Article III, Sections (a) and (b) shall fail to adjust the grievances, the services of the

(Testimony of Eugene S. Hawkins.)

Territorial Department of Labor shall be requested within forty-eight (48) hours thereafter. If within a reasonable time the Commissioner shall have notified the parties of interest of failure to adjust said grievance there shall be no stoppage of work for a period of forty-eight (48) hours thereafter.

“(d) Any settlement arrived at by the methods designated in Article III, Sections (a), (b) and (c) shall be subject to acceptance by the Employer and the Union, and if accepted shall be binding on the Employer, the employee or employees involved, and the Union.

“(e) There shall be no strike sanctioned or approved by the Union and no lockout instituted by the Employer during the life of this Agreement until every means of settlement provided for in this Agreement has been exhausted. At no time shall Union employees be required to act as strikebreakers or go through any picket line which is recognized by the Union as legal, however, Union employees whose work is required for [26] protection of property and equipment during any shutdown, shall stay on the job if requested by the Employer and shall not be considered as strikebreakers.”

This agreement goes on and provides for hours of labor and seniority, for hiring and discharging of employees, holidays, vacations, and union security. “It is understood and agreed that the following provisions relative to union security shall not become effective until the National Labor Relations Board shall have certified, as required by Section

(Testimony of Eugene S. Hawkins.)

8 (a) (3) of the Labor Management Relations Act, 1947, that a majority of the employees have voted to authorize such an agreement:

“(a) All employees who are members of the Union thirty (30) days after the effective date of this Agreement, and all employees who thereafter become members of the Union, shall as a condition of continued employment maintain membership in good standing in the Union.”

Then the wage provision, and a termination clause providing that it be effective “until April 1, 1948, and shall be continued thereafter for yearly periods unless written notice of termination or revision is given by either party, subject to the terms set forth in this Article.”

Whereupon, the jury was duly admonished and Court adjourned until 10:00 o'clock a.m., April 29, 1949, reconvening as per adjournment, with all parties present as heretofore [27] and the jury all present in the box; whereupon, the trial proceeded as follows:

Mr. Banfield: May we have permission to call a witness out of order? We have a representative of the Local Union we would like to put on this morning.

The Court: You may call him.

Mr. Andersen: Is it your intention to prove certain documents?

Mr. Banfield: Yes.

Mr. Andersen: I have a copy of the Constitution you wished. I have also been advised this Constitution to which you refer is apparently the one here. You wanted a list of names of the officers. I will read into the record——

Mr. Banfield: For 1947-48?

Mr. Andersen: Yes; during the time you mentioned. I am doing this in the interest of time. The officers of Local 16, Juneau, defendant union, in 1947 were as follows: President, A. Wukich; Financial Secretary, first half, A. Burgo; second half, C. Hellonen; Recording Secretary, first half, D. McCammon; second half, A. Laiti. 1948: President, first half, A. Wukich; second half, E. Pearson; Recording Secretary, first half, A. Laiti; second half, Herb Lenz; Financial Secretary, first half, C. Hellonen; second half, A. Laiti. 1949: President, E. Pearson; there was no recording secretary; Financial Secretary, Alex Laiti. [28]

Mr. Strayer: I was going to ask that these be marked for identification so we can identify them in the record. The Constitution of the International should be Plaintiff's Exhibit 3 and——

The Court: Could they not be introduced at this time?

Mr. Strayer: So far as the International Constitution, yes; but I haven't had an opportunity to see the Local Constitution before. I don't know if it is material. I will look it over during recess.

Mr. Andersen: Which is which?

Mr. Strayer: 3 will be the International Constitution.

Mr. Andersen: For identification; and 4 for Identification will be the Local; is that correct?

Mr. Strayer: Yes.

The Court: I doubt now whether the record shows now that it was stipulated by the parties that the persons whose names you called off, and their titles, were the officers of the Local. I think that that mention of it, implying a stipulation, was not read into the record.

Mr. Andersen: I think he was taking the word of counsel that that was the fact.

Mr. Strayer: I have no independent information. It may be agreed that if an officer of the Local were called he [29] would state that those were the officers at that particular time.

The Court: The record may so show.

Mr. Strayer: For the record, the document, Plaintiff's Exhibit 3, the Constitution of International Longshoremen's & Warehousemen's Union, is admitted in evidence by stipulation?

Mr. Andersen: We will object.

Mr. Strayer: You will stipulate to Identification, Plaintiff's Exhibit 3, and that it is a true copy of the Constitution of the International Longshoremen's & Warehousemen's Union, as amended to April 11, 1947?

Mr. Andersen: No. As of that day.

Mr. Strayer: It says on the face, "As Amended to April 11, 1947."

Mr. Andersen: Whatever it says.

Mr. Strayer: And may it also be stipulated for

the record that document, Plaintiff's Exhibit 4 for Identification is a true copy of the Constitution and By-Laws of Local 16 of the International Longshoremen's & Warehousemen's Union, and dated June 30, 1942, Revised February 26th, and it states, March 6 and 20, 1944.

The Court: The question remains as to the admissibility.

Mr. Strayer: Yes, your Honor. [30]

CLARENCE HELLONEN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Strayer:

Q. Will you state your name.

A. Clarence Hellonen.

Q. Are you a member of the International Longshoremen's & Warehousemen's Union?

A. I am a member of I.L.W.U., Local 1-16.

Q. Local 1-16 or Local 16?

A. Local 16; District 1, Local 16.

Q. Do you hold any official position with that Local?

Mr. Andersen: May I interrupt, counsel? You also requested in your subpoena the presentation of certain documents. This officer is not in charge of any such documents. If you wish, I will arrange with the proper officer of the Local to produce such documents if they are available.

Mr. Strayer: Thank you. That will be all, Mr. Hellonen.

(Witness excused.)

EUGENE S. HAWKINS

resumed the witness stand.

Direct Examination

(Continued)

By Mr. Banfield:

Q. Mr. Hawkins, you testified about a meeting of the I.W.A. Local representatives and of bargaining with them. Now, [31] I would like to know, if at that meeting with the I.W.A. after they had shown, as you testified, that they were representative of over half the employees, whether there was any understanding or agreement reached there regarding any old contracts of your predecessor company, Juneau Lumber Mills?

Mr. Andersen: May it please the Court, I desire to object. The question calls for conclusions. To ask for any understanding, it enters this area of complete definability. I would like again to object to the question which calls for the witness' conclusions.

The Court: Well, I don't know whether counsel means a mere understanding or an agreement, but it seems to me that the witness would be competent to state whether as a result of that discussion or conference there was an agreement of that kind or

(Testimony of Eugene S. Hawkins.)

some other kind arrived at, and he may answer yes or no.

Mr. Andersen: May I again respectfully state, all the witness can testify is what was said. Whether it was an agreement or something else is not for the witness to determine, but for another body to determine. I don't believe he should characterize what is an agreement or understanding; I don't think he should. He should say what was said.

The Court: I thought you were objecting to the details rather than the effect. [32]

Mr. Andersen: I don't want the witness to testify to conclusions. I want him to testify to what was said, and then, if it is relevant or irrelevant, it can go in or stay out.

Mr. Banfield: We agree; that is correct. In negotiations of this kind, it is perfectly competent to say what was said.

The Court: I misapprehended the nature of your objection.

Mr. Andersen: That was the nature of my objection yesterday.

Q. Was anything said in this conference——

Mr. Andersen: May I interrupt? Would you put the date of the conference if possible?

Q. The conference, Mr. Hawkins, after the I.W.A. had proved to you that they represented over half of the employees of the plant; that is the conference we are talking about.

(Testimony of Eugene S. Hawkins.)

Mr. Andersen: The date please, counsel.

Mr. Banfield: The witness testified that some time had elapsed after May the 1st and that it was shortly after that and——

Mr. Andersen: I think I will object that no foundation has been laid. I request that a proper foundation be laid.

The Court: A proper foundation be laid for what? [33]

Mr. Andersen: Time, place, persons present.

The Court: Well, I think that the time should be made more certain if possible.

Q. Mr. Hawkins, going back, you testified yesterday about your taking over on May 1st?

A. Yes.

Q. Now, how long was it after that that they gave this evidence or proof to you that they represented over half the employees?

A. It was by the time the first pay roll had been made out.

Q. Would that be two weeks, a month, or what?

A. That would be three weeks.

Q. And how long was it after that that the conference was held, the next conference was held with the I.W.A.?

A. About a week.

Q. And who was present at this conference?

A. Tim O'Day, Glen Kirkham.

Q. Who was Tim O'Day?

A. The Secretary of the I.W.A.

Q. And who was Mr. Kirkham?

(Testimony of Eugene S. Hawkins.)

A. The President.

Q. Now, at this conference was there any agreement reached—what was said by the I.W.A. with respect to how you could operate in the future?

Mr. Andersen: To which we will object, may it please [34] the Court, as hearsay and immaterial.

The Court: I thought you wanted that to come out.

Mr. Andersen: I said, your Honor, the proper way was to determine what was said, then I would object as to admissibility. I object now that it is immaterial and hearsay.

The Court: The statement you made a while ago is incompatible with hearsay. If you want facts or statements made there which would show whether there was any contract or agreement which resulted therefrom, it seems you are precluded from objecting that it is hearsay.

Mr. Andersen: Well, your Honor, this witness is the plaintiff's witness, and I have never heard it said yet that the other side of the case, that the other side wanted evidence to go in. Counsel is trying to prove some sort of case and trying to put in some sort of evidence. As I read this case and understood the issues, I fail to see the materiality of this line of questioning; I not only fail to see the materiality, but I contend respectfully, your Honor, that it is hearsay and inadmissible for that reason.

(Testimony of Eugene S. Hawkins.)

The Court: Well, you mean whether or not an agreement resulted there of the kind implied by his questions is immaterial?

Mr. Andersen: I consider it such, your Honor, under the issues as framed.

The Court: Objection is overruled then on that ground. I am still unable to understand your objection of hearsay in view of your statement a few moments ago that the witness relate what was said instead of conclusions.

Mr. Andersen: That is true. When this witness testified an agreement was made, that is his conclusion. . . Whether an agreement was in fact made or not, I said the proper way, and counsel agreed, was not by the witness boldly saying he entered into a contract, but by stating what was said.

The Court: But when he attempts to do that, you object.

Mr. Andersen: That brings up the second question—materiality.

The Court: I have ruled on that. Proceed.

Q. Mr. Hawkins, what was said by the I.W.A.?

Mr. Andersen: The same objection, may it please the Court.

The Court: Overruled.

Mr. Andersen: And rather than repeat, the objection may run to the line of questioning, with the same ruling?

The Court: The record may show that.

Q. What was said by the I.W.A. representa-

(Testimony of Eugene S. Hawkins.)

tives regarding the manner in which you would operate at the plant; that is, what did they offer, and what did you offer; tell us what was done? [36]

A. We had quite a conference, and all I could relate was the ultimate conclusion of that conference in which it was mutually agreed——

Mr. Andersen: Again I object, may it please the Court, to this witness' characterizing—as the witness stated, “All I can do is give my conclusion.” I submit it is inadmissible in the light of our last discussion, may it please the Court.

The Court: Well, I have tried to accommodate the views of counsel here, but since it now appears that the agreement that, it was alleged, resulted followed perhaps hours of discussion at which thousands of things might have been said, it is impractical to put in all those things and it is unreasonable to expect the witness to relate each statement made by anybody that participated in the discussion and, hence, I think we will have to go back to the rule that the witness may state the conclusion. You may cross-examine him on it.

Q. Will you relate what was agreed as a result of your negotiations?

A. That the Juneau Spruce Corporation would continue to operate under the same rate of pay and the same hours of work as had been enforced under the Juneau Lumber Mills, and that other conditions would be talked over and agreed upon as they came up during the course of a forming of the new contract. [37]

(Testimony of Eugene S. Hawkins.)

Q. Now, did anything come up with respect to who they would bargain for? A. Yes.

Mr. Andersen: I am going to object to that. It is a leading question, leading and suggestive, may it please the Court.

The Court: Objection is overruled. It is a preliminary question.

A. Yes.

Q. And did you meet regarding it?

A. Yes.

Q. And what was decided?

A. It was decided that they would represent all of our employees with the exception of those on our tugboats and in our logging camps.

Q. Did it result in a binding and definite understanding on that point? A. Yes.

Mr. Andersen: I am going to move the last question be stricken and the last answer be stricken; the same objection, may it please the Court.

The Court: Maybe the "binding" might be eliminated from it, but the answer that there was an agreement reached will stand.

Q. Did you consider it to be a binding agreement? [38]

Mr. Andersen: To which I object as calling for his conclusion.

The Court: You might ask him, did the parties operate under it.

Q. Did you operate under it as a binding agreement? A. Yes.

(Testimony of Eugene S. Hawkins.)

Q. And did you live up to that agreement?

Mr. Andersen: The same objection, may it please the Court; and immateriality.

The Court: Objection overruled.

A. Yes.

Q. Now, Mr. Hawkins, as a result of this conference soon after or about a month after the take over of the properties, was there any understanding or agreement reached with respect to whether or not there was any written contract in effect as a holdover from the predecessor company?

Mr. Andersen: I object to the line of questions.

The Court: Repeat the question.

Court Reporter: "Now, Mr. Hawkins, as a result of this conference soon after or about a month after the take over of the properties, was there any understanding or agreement reached with respect to whether or not there was any written contract in effect as a holdover from the predecessor company?"

The Court: Objection overruled.

Mr. Andersen: May we have a foundation laid for [39] this?

The Court: Specifically as to the time.

Mr. Banfield: This is a conference about a month after the take over.

The Court: Is it the same conference?

Mr. Benfield: Yes.

A. Yes.

Q. What was that agreement?

A. We explained——

(Testimony of Eugene S. Hawkins.)

Mr. Andersen: The same objection.

The Court: The same ruling.

A. We explained our take-over agreement basically to the president and secretary, and they were able to see whereby we didn't take over the predecessor's agreement.

Mr. Andersen: I move that be stricken.

The Court: That last part is incompetent and will be stricken.

Q. What did they say respecting that?

A. That is basically what they said that, after we explained our position, that they could see where it would necessitate working out a contract with the Juneau Spruce Corporation.

Mr. Andersen: The same objection as to his conclusion, and I move it be stricken.

The Court: Objection overruled. [40]

Q. Did they acknowledge it was not binding upon you?

Mr. Andersen: May I interrupt to state to your Honor that there is no showing here that these people can't be produced rather than have hearsay.

Mr. Banfield: We could produce Mr. Tim O'Day and the other one. As the Court well knows, it is impossible to question three at one time, only one at a time, and we are entitled to question any one of them as to what was said and done in negotiations between the two parties resulting in a verbal agreement.

The Court: Objection is overruled.

(Testimony of Eugene S. Hawkins.)

Mr. Banfield: And also, may it please the Court, if we come to the point of a meeting and no agreement, we are still entitled to show what was done between them.

The Court: You may proceed.

Mr. Banfield: Repeat the question, please.

Court Reporter: "Did they acknowledge it was not binding upon you?"

The Court: It isn't clear to me what is referred to in that question—it not being binding.

Mr. Banfield: If the Court please, yesterday we had the testimony here regarding the fact that there had been a former agreement between the Juneau Lumber Mills and the I.W.A. The question is, did they acknowledge it was not binding on the Juneau Spruce Corporation. [41]

Mr. Andersen: As I understand it, I thought you were talking about four weeks after the take over. I made an objection. Counsel said it was the same conference. The only question was referring to four weeks after. Now you are talking about a written agreement. I don't wish to be confused. I am sure the jury doesn't wish to be confused.

Q. Mr. Hawkins, at these conferences was there any discussion of a prior agreement?

Mr. Andersen: I object to any question about subjects in the conference. I submit under the rules of evidence, if you wish to interrogate a witness about meetings, by practice and custom you

(Testimony of Eugene S. Hawkins.)

lay a foundation—the time, place and persons present; otherwise, as your Honor stated, we will be unable to cross-examine and will be going all over it and wasting the time of the Court.

The Court: I think for the benefit of all parties, I think it should appear clearly, the occasion as well as those present and also the particular agreement that was under discussion or that resulted. I know it isn't clear to me.

Q. Now, Mr. Hawkins, at the meeting between the Juneau Spruce Corporation and the I.W.A. one month after the take over, that would be about June 1st, at which Mr. Kirkham, the President of the I.W.A., and—who is the other—Mr. O'Day, as Secretary of the I.W.A., and yourself, as Manager of the Juneau Spruce Corporation, was present, was there any [42] discussion regarding the prior labor contract or a labor contract between the I.W.A. and Juneau Lumber Mills, Incorporated?

A. Yes.

Q. Tell us what was said regarding that contract.

A. That was brought up in the explanation of our take-over agreement, that the Juneau Lumber Mills, Incorporated, was a corporation still in existence, and Mr. Rutherford, the President, had announced to us, the Juneau Spruce Corporation, that he intended to remain an active corporation and that their agreement with the Juneau Lumber Mills, therefore, was still binding on the Juneau Lumber Mills and it would necessitate us in negotiating a new agreement with them.

(Testimony of Eugene S. Hawkins.)

Mr. Andersen: May it please the Court, I want to move that that be stricken. Obviously it is a conversation the witness had with Mr. Rutherford, as I understand the answer.

Q. No. This was the discussion, this entire discussion, and what was said was what happened at this meeting? A. Yes.

Q. Who explained that the Juneau Lumber Mills was still in existence? A. I was——

Mr. Andersen: I assume my objection heretofore [43] might run to this line of questioning, and the same ruling of the Court?

The Court: Yes.

Q. With respect to this agreement, was it acknowledged and agreed by both parties, the Juneau Spruce Corporation and the I.W.A., that this former contract was not binding upon the Juneau Spruce Corporation?

Mr. Andersen: I object as calling for the conclusion of the witness.

Mr. Banfield: It is a question of fact, your Honor.

The Court: Objection overruled.

Q. Was it agreed or wasn't it?

A. Yes.

Q. Now, Mr. Hawkins, were you present in Juneau all the time during May, June and July of 1947? A. Not all the time, no.

Q. During your absence and during those three months who was in charge of the office and the

(Testimony of Eugene S. Hawkins.)

management of the Company's affairs at Juneau?

A. George Schmidt.

Q. Now, Mr. Hawkins, during July—tell us first, what was the first meeting you had with any longshoremen's representatives, these representatives of Local 16? A. In July.

Q. And was that—at whose request was that meeting? [44] A. At their request.

Q. And who was present?

A. Mr. Ford and Mr. Wheat and another fellow—I don't recall his name.

Mr. Roden: July, 1947?

Q. Yes; July, 1947. Mr. Hawkins, who did they represent themselves to be?

A. The officials of the Local Longshoremen's Union 1-16.

Q. What did they claim to have authority to do?

A. To negotiate an agreement for certain work of the Juneau Spruce Corporation.

Q. And what did they ask that this work should include in this agreement? Did they ask that an agreement be negotiated? Answer that first.

A. Yes.

Q. Just relate now the whole conversation that took place there between these two gentlemen and yourself.

Mr. Andersen: I would like to interpose a separate objection so far as the International is concerned, may it please the Court, that there is no foundation for the admission of any of this evidence in so far as the International is concerned.

(Testimony of Eugene S. Hawkins.)

I assume the Court will want to take the objection and not rule at the present time.

The Court: Unless the International is connected up with it, the jury will be instructed——

Mr. Andersen: I just want to preserve the record, may it please the Court, at this time.

Q. Go ahead, Mr. Hawkins.

A. Well, they wanted first——

Mr. Andersen: May I against object on the ground that the witness has a habit of characterizing—such as, “They wanted to.” I don’t want to make too many objections. I would like for the witness to say what was said rather than his opinion of what was said. It is more effective—what was said, rather than what he concludes they said.

Q. What did they say, Mr. Hawkins?

A. They said they wanted to negotiate an agreement both coastwise and local for the work of handling our products from the first place of rest to and across the bull rail.

Q. Now, did they explain to you what they meant by a coastwise agreement? A. Yes.

Q. What was that?

A. That was a general agreement which was in effect in Pacific Coast ports.

Q. And did they explain what they meant by a local agreement?

A. That was one which pertained only to the Juneau Port here and special provisions for this locality.

(Testimony of Eugene S. Hawkins.)

The Court: Did you say a moment ago “general” or “gentlemen’s” agreement? [46]

A. General.

Q. Now, Mr. Hawkins, was this to be in one agreement or in two separate agreements?

A. Two separate——

Q. What did they say?

A. Two separate agreements.

Q. Now, did they explain what they meant by they wanted to work between, you said, the last place of rest and the bull rail—the first place of rest and the bull rail; did they explain that?

A. Yes.

Q. What did they explain it to be?

A. In effect when we stacked lumber in our yard from the main sawmill, that would be considered the first place of rest. From there it would be taken, unstacked and taken to our remanufacturing plant and processed to the customer’s specifications, and taken to the bull rail or in the vicinity underneath our crane to accumulate in lots assigned to the customer and the use of our carriers and lift trucks to facilitate this movement.

Q. Trace that through and show just what the longshoremen wanted to do.

The Court: First maybe he better explain the significance of the bull rail in the operation.

Q. What is the bull rail? [47]

A. That is the face of the dock.

Q. In other words, the edge of the dock on the water side?

A. Yes.

(Testimony of Eugene S. Hawkins.)

Q. Now, will you trace through and explain what it was, which operations and which work, the longshoremen said they wanted to do?

A. Unstacking the lumber from our storage area, delivering it to the remanufacturing plant, and assembling it at the place where we accumulated these customers' orders in lots.

Q. Now, what would the individual workers be doing; would they be handling it by hand or machine or what?

A. They would be handling it practically altogether by lift trucks and carrier—lumber carrier.

Q. You mentioned you take your lumber and make it to the specifications of the customers, I believe. Will you explain what you mean by that?

A. We cut entirely on orders.

Q. Pardon me. You mean after the order is received?

A. Yes.

Q. Go ahead.

A. We manufacture that in the main sawmill, then accumulate it in our storage area until the order was cut out in the rough, then put it through the remanufacturing plant for processing to the various patterns and grades and [48] lengths, and then accumulate this on the face of our dock in the vicinity of our crane preparatory to loading it on.

Q. You mean to imply this storage area is the whole yard down there?

A. Yes.

Q. And it stays out in the yard until you put it back in the remanufacturing plant to groove and plane it for particular orders you have to fill?

(Testimony of Eugene S. Hawkins.)

A. Yes.

Q. Before that, where is particular lumber put, where does it rest next?

A. In the vicinity of our crane on the face of the dock.

Q. How close would that be to the crane?

A. Within reach of its gear.

Q. And then the work you are describing as the longshoremen's work would be taking it into the manufacturing plant for processing and taking it out and putting it in lots under the crane?

A. Yes.

Q. At that time, Mr. Hawkins, how were you disposing of your lumber?

A. The Engineers were taking most of it.

Q. Who were the Engineers?

A. United States Army, Engineers Department.

Q. And how were they taking it? [49]

A. By their carriers from a designated area in our plant.

Q. And were you disposing of any otherwise?

A. Yes.

Q. How? A. By commercial steamship.

Q. Where would that lumber go?

A. That would go mostly to Alaska ports—Anchorage and Fairbanks—some to Seattle and Tacoma.

Q. Now, when the Engineers took it, who drove the carriers that picked it up at your yard?

A. The Engineers' drivers.

Q. They weren't hired or paid by you?

(Testimony of Eugene S. Hawkins.)

A. No.

Q. When it was shipped to Anchorage or Fairbanks, how would it be shipped; that is, what method of carrier?

A. Commercial carrier.

Q. By that you mean steamships?

A. Yes.

Q. Mr. Hawkins, when the steamer took it aboard, where did the steamer dock?

A. At our dock.

Q. And whose tackle would lift it aboard?

A. The steamship tackle.

Q. Now, who would attach the slings to this lumber which was going aboard? [50]

A. The longshoremen.

Q. By whom were they hired for that?

A. By the steamship company.

Mr. Andersen: I ask that answer be stricken. First, it is not the best evidence; and second, it is contrary to the opening statement of counsel. The records of this company would be the best evidence as to who hired those people—of either this company or the other company—it would be the best evidence. There is no showing this is the best evidence available. We say they were hired by this company and it paid the social security and all those charges. Now, I submit that the best evidence is available and should be produced.

Mr. Strayer: He is not talking about shipments by cannery tenders, but about commercial steamship operation.

(Testimony of Eugene S. Hawkins.)

The Court: You mean he misconstrued your opening statement?

Mr. Strayer: Yes.

Mr. Andersen: I still don't think it would be the best evidence. There are records in our possession that this company paid wages, social security and withholding tax on wages for the men doing this work. My basic objection is the best evidence—the pay roll records would be the best evidence.

The Court: You contend that it was the Juneau Spruce Corporation that paid the longshoremen and not the [51] Alaska Steamship Company?

Mr. Andersen: All the longshoremen—it is this, may it please the Court—that from the, all during the time they worked at that dock, where the Juneau Lumber or the Juneau Spruce hired them, they were paid in the same manner, by the same people occupying the premises, whether the Juneau Lumber or the Juneau Spruce. They both called them and paid them in the same way. They paid them in the same way for ten years.

The Court: I have forgotten whether it was the question or answer to which you objected.

Mr. Banfield: He objected on the ground of the best evidence. We have plenty of means of proving how and who paid them and hired them, etc. I would like to withdraw the question and ask this:

Q. Did you hire the longshoremen to attach the slings to the lumber going aboard commercial steam-

(Testimony of Eugene S. Hawkins.)

ers for shipment to the westward? A. No.

Mr. Andersen: Could I ask a question? Do I understand—do you mean whether the Company or this witness personally did it?

Mr. Banfield: The Company.

Mr. Andersen: All right.

Q. Did the Company hire the men to attach the slings to put [52] the lumber aboard commercial steamers for shipment to the westward?

A. No.

The Court: When you say the Company, perhaps you should say the plaintiff.

Mr. Banfield: All right. The plaintiff.

Q. Did the plaintiff pay these men?

A. No.

Q. Now, did you send shipments of Lumber to any other places except ports in Alaska by commercial steamer? A. Yes.

Q. Where did you sell that lumber?

A. At Seattle and Tacoma.

Q. And where did the commercial steamers dock to take that aboard? A. At our dock.

Q. And who transported the lumber to the face of the dock? A. Our yard employees.

Q. Now, these yard employees, what were their duties?

A. To transport lumber to the face of the dock for storage or shipment, or to and from our re-manufacturing plant.

Q. What did they do when they weren't doing that particular work?

(Testimony of Eugene S. Hawkins.)

A. They were stacking and unstacking lumber in the storage areas. [53]

Q. Did they have any other duties that you can think of? A. No.

Q. Now, Mr. Hawkins, after it arrived at the face of the dock, who attached the slings to the lumber?

A. You mean on the commercial shipments?

Q. Yes. A. The longshoremen.

The Court: Well, are you distinguishing now, or is this the same thing you asked about a moment ago? Are you distinguishing the shipments to the States from those made to Alaska ports?

Mr. Banfield: May it please the Court, they were handled in exactly the same fashion, except we haven't brought out before who did the dock work on shipments to the westward.

Q. Now, whose tackle hoisted it aboard the steamer? A. Steamship tackle.

Q. Did the plaintiff hire the longshoremen for this work? A. No.

Q. Who stored the lumber in the hold of the ship? A. The longshoremen.

Q. And did the plaintiff hire the longshoremen for that work? A. No.

Q. Did the plaintiff pay the longshoremen for either attaching the slings on the dock——

Mr. Andersen: This will be subject to the same objection.

Q. Or stowing it aboard? A. No.

(Testimony of Eugene S. Hawkins.)

Q. Now, Mr. Hawkins, when you shipped to the westward, who did the work of bringing the lumber up to the bull rail or face of the dock?

A. Our yard employees.

Q. Were your yard employees hired just from time to time by the hour, or were they steady employees?

A. They were steady employees.

Q. Now, in this—going back to your conference that you had with the longshoremen at which Mr. Ford and Mr. Wheat were present in July of 1947, how much of this work did they claim that they wanted to do?

A. All that work.

Q. And did they contend that you were the employers as to stowing the lumber aboard the boats or attaching the slings?

Mr. Andersen: I object. Counsel said “contend.” What did they say?

Q. Did they say they wanted you to hire them on the boats?

Mr. Andersen: I object. I think he can ask the question without putting the words in the witness' mouth.

The Court: It might be pretty difficult to direct his attention to this point without a suggesting or leading [55] question.

Mr. Andersen: Then all examinations would then be through leading questions.

The Court: Not all; but it is obvious in this case it might be. I am not saying it is. It might be difficult to direct his attention to the precise

(Testimony of Eugene S. Hawkins.)

point. If you can do that without leading or suggesting, you may of course do it.

Q. Did the longshoremen ask—did you hire them to do the work on the ships?

Mr. Andersen: I think I will object to that question. I think it is an exceedingly leading question. Why can't he say, what did the longshoremen state with respect to this work?

Mr. Banfield: All right.

Q. Did they state anything, Mr. Hawkins, with regard to attaching slings or working in the hold of vessels; was that the subject of conversation?

A. No.

Q. Now, who did you say that you would do regarding their demands?

A. We couldn't do anything regarding their demands.

Q. Did you state the reasons? A. Yes.

Q. What reasons did you give?

A. That we had agreed, after being shown that the I.W.A. [56] represented a majority of our employees, to consider them the exclusive bargaining agent, and were in the process of negotiating a workable agreement at that time.

Q. Did you give any other reason for this?

A. No.

Q. Now, at that time who was performing the work the longshoremen wanted?

A. Our yard employees.

(Testimony of Eugene S. Hawkins.)

Q. Would it necessitate discharging any of your yard employees if you were to hire longshoremen for that work?

Mr. Andersen: I object. It is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Yes.

Q. How many yard employees did you have down there?

A. About eight.

Q. And how many shifts were you working?

A. We worked one shift part of the time and two shifts part of the time.

Q. And were there eight of each shift, or when you were working two shifts, or just eight each day?

A. When we were on a two-shift basis, we normally had more employees in the daytime than at night because they wasn't able to see, and there were other problems in that, and the day-shift employees did some of the night-shift [57] production work.

Q. In other words, would it be more or less, or more than eight when you were working two shifts?

A. Yes.

Q. And now, Mr. Hawkins, when did you have another meeting with any person representing either of the defendants in this case?

A. In August.

Q. About what time in August; do you know?

A. The very early part of August.

(Testimony of Eugene S. Hawkins.)

Q. And where was that meeting held?

A. In my office in the Juneau Spruce.

Q. And at whose request?

A. The fellow just came in the office and requested to talk to me at that same time.

Q. What was his name?

A. Verne Albright.

Q. Who did he represent himself to be?

A. He——

Mr. Andersen: I object as calling for a conclusion of the witness, may it please the Court.

The Court: Perhaps the question should be what he said.

Q. Yes. What did he say—who he represented?

A. He said he was a representative of the I.L.W.U. International. [58]

Q. Did he state where he lived?

A. Not as I recall.

Q. How long did you talk to Mr. Albright?

A. Quite some time; a couple of hours, I would say.

Q. Was it a friendly conversation; that is, a businesslike conversation; or was it antagonistic? What was the general feeling of the conference?

Mr. Andersen: I object. It should be what was said and done.

The Court: Unless you claim some materiality for the demeanor.

Mr. Banfield: Yes, we do your Honor. We wish to show Mr. Hawkins dealt with members of the

(Testimony of Eugene S. Hawkins.)

union on a business-like basis without antagonism or prejudice whatever, and we think—the conference was of considerable length, as testified—we should be able—we can't show just how he made every statement and every statement that was made in that period of time. We would like to show what the general atmosphere was of both sides.

Mr. Andersen: I think it must be assumed that people conduct themselves as pleasant people.

Mr. Banfield: There is no such presumption.

The Court: I think there is at least a presumption of fact that nothing untoward marked the discussion if it is [59] not brought out, and it doesn't appear to me of any importance or significance how he treated him at this stage of the case.

Mr. Banfield: May it please the Court, it was in the opening statement of Mr. Paul that the Juneau Spruce Corporation took a bitter and antagonistic attitude to the longshoremen and he went on a great length to show how he treated the longshoremen. We wish to show the contrary.

The Court: That may be, but it would be a proper subject to go over in rebuttal but not in your case in chief.

Mr. Banfield: Very well.

Q. Now, what did Mr. Albright say that he wanted?

A. To negotiate a coast-wise contract and also a local contract.

Q. And did he explain what he meant by a coast-

(Testimony of Eugene S. Hawkins.)

wise contract? A. Yes.

Q. What did he explain that to be?

A. It was a general agreement which they had in effect up and down the coast, general provisions covering all the longshore work.

Q. Did he explain what he meant by a local agreement? A. Yes.

Q. And what did he explain that to be?

A. That was an agreement taking care of special provisions peculiar to Juneau, as all ports had a little difference in some manner or other. [60]

Mr. Andersen: To which, may it please the Court, I assume, my same objection runs—no foundation and materiality in so far as the International is concerned, may it please the Court.

The Court: Yes; it is admitted subject to the same reservation.

Q. Mr. Hawkins, what did you say that you would do?

A. I went into some length to explain to him what had transpired in a previous meeting, the first meeting with the Local officials of the I.L.W.U., and we discussed the general thing for quite some time.

Q. But what did you say regarding your agreement or refusal to make these agreements which he wanted?

A. I reiterated my former statement that we couldn't bargain in good faith with the I.L.W.U. in

(Testimony of Eugene S. Hawkins.)

that we had already recognized the I.W.A. as the exclusive bargaining agent.

Q. What particular operations——

Mr. Andersen: Did you say “represented” or “recognized”?

The Court: “Recognized.”

Mr. Banfield: I think “recognized” as representative——

Mr. Andersen: He had his hand over his mouth, and I couldn’t very well hear him.

Q. Mr. Hawkins, speak loudly enough so we can all hear you. [61] Tell me, what work, particular operations, did Mr. Albright say he wanted to include under this contract?

The Court: Now, which? He spoke of two.

Q. Did he want to include the same work under both? A. He was talking for both.

Q. What work did he want to include?

A. All the work from the bull rail out which went on water-borne equipment, floating equipment.

Q. Now, did he ask you to take over and pay for this work which, you say, you didn’t pay for, such as attaching of slings and loading on commercial steamers?

Mr. Andersen: The question is suggestive, may it please the Court.

Mr. Banfield: I want to see if the arrangement of work he wanted——

The Court: Probably it would be preferable to ask him to explain what work Albright wanted

(Testimony of Eugene S. Hawkins.)

and, if he seems to have difficulty recalling any of it, you can remind him of it.

Q. What work did he wish to include under these contracts according to his own statements?

A. The same as I said. He wanted from the bull rail out for everything that went on floating equipment.

Q. Did he say anything regarding this other work in the yards which the longshoremen formerly had requested?

Mr. Andersen: I object. The question fully covered—— [62]

The Court: It seems to me his last answer would exclude that, wouldn't it?

Mr. Banfield: No, it wouldn't. I am asking now if he asked for this work which was requested before.

Q. Let me ask, was there any discussion by Mr. Albright in making statements regarding the work the longshoremen had asked you for in the previous meeting? A. Yes.

Q. What did Mr. Albright say about it?

A. That was part of the lengthy discussion we had, and me telling him what had transpired before and what they wanted and the impracticality of it and we couldn't do it and such, and he said that

(Testimony of Eugene S. Hawkins.)

was asking too much and was unreasonable, that they didn't want that work and really only wanted to work from the bull rail out.

Q. Did they already have the work on the commercial steamers? A. Yes.

Q. Was that through some other employer or someone else, or plaintiff company?

A. Through another employer.

Q. Now, what work was Mr. Albright referring to at this particular time as being work that he wanted to put under the contract?

A. That was loading of supplies, general supplies, for our logging camp, groceries and rigging of all kinds, and just [63] generally.

Q. And with what labor—that is, who had been doing this work loading supplies for the logging camp? A. Our yard employees.

Q. Who would take it from the warehouses to the face of the dock? A. Our yard employees.

Q. And who would operate the crane that would put it aboard? A. Our employees.

Q. And who stored it aboard the boats?

A. Our employees.

Q. What boats would be used?

A. The tugboats that made regular trips to the camp and barges that were towed by them with the stuff aboard.

Q. Who owned these tugs and barges?

A. The Juneau Spruce Corporation.

(Testimony of Eugene S. Hawkins.)

Q. Was there any other work that Mr. Albright was referring to as coming under this contract, proposed contract? A. No.

Q. Was there any discussion at that time regarding the hiring of men to load fishing vessels and other people's small equipment? A. No.

Mr. Andersen: Pardon me. Are you still on the conversation with Mr. Albright? [64]

Mr. Banfield: That is the only one we have been talking about.

Mr. Andersen: I wanted to make certain.

Q. Did he mention that at all? A. No.

Q. Tell me, Mr. Hawkins, you have described your sales to the Engineers and sales shipped by commercial steamers; were there any other sales of merchandise or lumber made by the mill at this time? A. Yes.

Q. What were they?

A. Primarily fish boxes and some lumber.

Mr. Andersen: Could I interrupt just a moment? You are not now talking about any conversation with Mr. Albright?

Mr. Banfield: I am talking about the type of sales.

Mr. Andersen: Are you through with the conversation?

Mr. Banfield: No.

Mr. Andersen: I have difficulty following what he told Mr. Albright. It is difficult to follow the con-

(Testimony of Eugene S. Hawkins.)

versation. When there are continuous other references, it is difficult.

The Court: He is just leading up to something discussed in that conversation.

Mr. Andersen: That is fine. May I interrupt to suggest a narrative by reference—— [65]

Mr. Banfield: I will use any chronological order I please. But I am stating here and now I asked about the conference with Mr. Albright. Now, I said, “at this time,” meaning at the time of the conference with Mr. Albright, “was there any other method of selling lumber?” And he is telling us the method at that time.

The Court: You may proceed, and for counsel’s benefit you may indicate when you are through with this particular conversation.

Mr. Andersen: That would be helpful all around, your Honor.

Q. You stated, Mr. Hawkins, you sold principally fish boxes, but some lumber, to be delivered on these small boats? A. Yes.

Q. Where did these small boats come from?

A. All over Southeastern Alaska—fish company cannery tenders and fish company boats.

Q. Was a great quantity or a small quantity of sales made that way?

A. A small quantity of sales.

Q. Who would own these various vessels?

A. Various fishing companies.

Q. How did they order the material?

(Testimony of Eugene S. Hawkins.)

A. We would receive the order by mail ordinarily requesting a specific number of boxes and how many pound boxes they [66] should be, and how they would have their boat and barge or boat at our dock at a specific date, and request that we arrange for the stowing of the cargo or boxes aboard their equipment.

Q. Now, when they would come to the dock, who would move the boxes to be shipped and the lumber up to the face of the dock?

A. Our employees.

Q. Who would operate the crane?

A. Our employees.

Q. And who would disengage the slings as they were placed on the small vessels?

A. The longshoremen.

Q. At what point in this delivery program did the transfer of this property take place from you, we will say, to the fishing company?

A. When it was landed on the fish company's vessel, it became their property.

Q. When shipping by commercial steamer, when did your obligation end and become the other man's property?

A. We were obligated to deliver lumber to within reach of the ship's tackle.

Q. You could summarize it — as long as the tackle was yours or it was handled by your tackle, you still owned it; and as long as it was handled by somebody else's tackle, somebody [67] else owned it? A. That is right.

(Testimony of Eugene S. Hawkins.)

Q. Now, Mr. Hawkins, who would request these longshoremen to come to work? A. We did.

Q. By that you mean the employees of the Juneau Spruce would make the request?

A. Yes.

Q. Who would actually do it?

A. George Schmidt.

Q. And how would it be done?

A. He would call the hiring hall and advise them to have a certain number of employees come to our dock at a specified time for the purpose of stowing cargo.

Q. Would they—all those men—work on the dock or the crane? A. No.

Q. When they finished stowing cargo on the boat, who would pay them? A. We would.

Q. With your company check. A. Yes.

Q. And who would make out the social security return? A. We would.

Q. Who would make out the withholding?

A. We would. [68]

Q. Now, Mr. Hawkins, was there any agreement between yourself and the customers as to who was to pay for this work? A. Yes.

Mr. Andersen: I object. It is incompetent, irrelevant and immaterial as to who may have paid for it. Customers of course always pay for everything. I think we are only concerned here with the relations between the parties, and between this

(Testimony of Eugene S. Hawkins.)

and any third corporation I respectfully submit it is incompetent.

Mr. Banfield: If the Court please, this is a preliminary question to determine an agreement and and then to show exactly how it was done.

Mr. Andersen: I don't think we are interested in an agreement between this company and any other not directly or indirectly interested in this proceeding.

Mr. Banfield: If the Court please, we are entitled to show if we were acting as an agent or how we were acting and what the facts were.

The Court: In loading these small vessels?

Mr. Banfield: Sure.

The Court: Objection overruled.

Q. Was there an agreement between you and the customers? A. Yes.

Q. What was the agreement?

A. That we would—— [69]

Mr. Andersen: Just a moment. I would like to ascertain whether the agreement was in writing. That would be the best evidence.

The Court: Yes.

Q. Was there any agreement in writing?

A. I don't know of it.

Mr. Andersen: I submit, if the witness doesn't know, the best evidence is valid.

The Court: Would it logically follow that because he doesn't know that it was in writing?

Mr. Andersen: The witness referred to an agree-

(Testimony of Eugene S. Hawkins.)

ment by the company, orally or in writing. This witness hasn't been connected with this company for better than a year. He says he doesn't know.

Mr. Banfield: If the Court please, we are still talking about August 1, 1947, at the time of the conference.

Mr. Andersen: He is no longer with the company probably.

The Court: But the question relates to the time he was in charge of the plant and was presumed to know.

Mr. Andersen: At that time, correct. But today he says he don't know whether it is or not. His recollection may not be what it was when he was with the company. If the agreement is in writing, they should produce it. We have a right to see it. It is the best evidence of its terms. [70]

The Court: The agreement doesn't apparently exist from what he says. Objection is overruled.

Q. Do you know of any agreement in writing?

A. No, I don't know of any specific agreement in writing.

Q. You were Manager there for thirteen months?

A. Yes.

Q. And at the period we are talking about?

A. Yes.

Q. Now, Mr. Hawkins, what was the arrangement under which you worked?

A. That we of course had a set price for our boxes or lumber, and the customer was billed for

(Testimony of Eugene S. Hawkins.)

that plus any other expenses the company incurred in his behalf, such as longshoring or any other expenses.

Q. Now, how many companies would you say you made deliveries to in this fashion?

A. Oh, I would say a dozen more or less; I don't recall how many; numerous.

Q. Did they always pay for this cost of longshoring in addition to the cost of materials?

A. Yes.

Q. Now, Mr. Hawkins, did longshoremen ever work for the Juneau Spruce Corporation on Juneau Spruce Corporation property? A. Yes.

Q. When was that?

A. Well, at one time the Whiz Packing Company and Engstrom were in dire need of fish boxes at Pelican City in a hurry. There was no commercial steamship to go in there for a considerable time in the future, and we chartered our tugboat to them to deliver as much boxes as it would hold to Pelican City for them.

Q. Do you remember about when that was?

A. That was about July.

Q. What year? A. 1947.

Q. And was it a considerable quantity of merchandise or a small quantity?

A. A considerable quantity; it was all the boat would hold.

Q. Who transported this material to the bull rail? A. Our employees.

(Testimony of Eugene S. Hawkins.)

Q. And who operated the crane?

A. Our employees.

Q. Who disengaged the slings on your boat?

A. The longshoremen.

Q. And who stowed it aboard the boat?

A. The longshoremen.

Q. How many longshoremen were employed, do you know?

A. I don't recall just how many were employed.

Q. One or two, or several? [72]

A. There were several.

Q. Who paid these longshoremen?

A. We did.

Q. And who made the social security and withholding returns? A. We did.

Q. Was there any agreement as to who would pay for this longshoring, you or the customer?

Mr. Andersen: The some objection. It can't be binding on these defendants; that is, their relations with other people can't be binding on the defendants.

The Court: I don't think—except in a remote sense—it just shows the relationship between the longshoremen and the plaintiff. Objection is overruled.

Q. Mr. Hawkins, how were you paid on that instance for materials and longshoring and all services performed?

A. We sold them the boxes f.o.b. Juneau, and chartered the boat to them for a set fee which included the boat charter and longshoring and expenses incorporated in getting the boxes to Pelican City.

(Testimony of Eugene S. Hawkins.)

Q. Now, Mr. Hawkins, did you have any policy with respect to deciding what loading operations would be done by mill employees and which would be done by longshoremen? A. Yes.

Q. What was the policy?

A. That any work being done on our equipment, our cranes and [73] our carriers and our boats and barges and such, would be done by our employees, and any work being done on anyone else's equipment would be done by longshoremen.

Q. Now, why did you vary that practice here when you knew that your men—or that the longshoremen would be working aboard your boat?

A. Because that boat was chartered to this fishing company and that was their desire that longshoremen be employed to stow the boxes and so forth and equipment aboard.

Mr. Andersen: I move that be stricken. It is completely hearsay.

The Court: It doesn't appear to be hearsay.

Mr. Andersen: I submit, your Honor, it is hearsay.

The Court: Objection overruled. But what isn't clear to me is how that differed. Is it only with respect that in the one case the longshoremen handled the tackle from the bull rail, so called, to the deck of the vessel, and in the other they just merely unloaded it aboard the vessel?

Mr. Banfield: If the Court please, I think Mr. Hawkins has described where there were various

(Testimony of Eugene S. Hawkins.)

kinds of shipments—commercial shipments, company boats and on the barges of customers and small boats.

The Court: I understand that. But it isn't clear to me the difference in the method of handling as between their own equipment and the floating equipment of others. [74]

Mr. Banfield: If the Court wishes, I can trace out each particular type of shipment and then show where the property line was in pursuance. Is that what the Court means?

The Court: No. You prefaced this line of questioning or these questions on this particular point with the statement that the longshoremen worked on the plaintiff's property. Now, the answer that he gave seemed to be—the answer he gave in reference to loading their products aboard steamers and other vessels than this particular vessel that was chartered—except that in the one case the longshoremen took charge of the loading as well as the unloading, and in the other that——

Mr. Banfield: I don't think the Court is straight on that. The testimony has been—for instance, a commercial carrier—the mill hands brought it up to the bull rail, and there the product was delivered. The transfer of possession was delivered to the common carrier. The common carrier hired men to take it and attach the slings, put it aboard the vessel and put it in the hold; that the Juneau Spruce was done with it when it was put at

(Testimony of Eugene S. Hawkins.)

the last place it was to be on their property. The carrier was employing the tackle and the men to hoist it aboard. Now, when a shipment went south, the same procedure was handled. When a shipment went to their logging camp, their own material was going to their own camp on their own boat. The mill hands brought it to the dock, operated the [75] crane and set it on the company's boats and barges, stowed it aboard, and it went to the logging camp. The property was owned all the way through by the lumber company. The lift trucks and slings, all the equipment was the company's, and it was done by their employees. But when a customer came with their equipment, the company brought it to the face of the dock. The company crane and company employees dropped it aboard the vessel, and there, he says, the ownership of the boxes changed hands because it was delivered on the property of somebody else, and at that point longshoremen were hired to handle it. Now, he testified in this one particular instance, when a shipment was going to Pelican, the mill employees brought it to the face of the dock, operated the crane and set it down on their own boat. It varies from the usual practice because the boat was under charter to Mr. Engstrom, the Whiz Fish Company, and that work ordinarily was done by longshoremen, and longshoremen were hired. I think that is a summary.

The Court: It could be said the method varied when the floating equipment was plaintiff's own and when it wasn't.

(Testimony of Eugene S. Hawkins.)

Mr. Banfield: That is right; and when the tackle used, if it was ship's tackle, there was a difference in employment than when the company's crane was used. If the Court please, Mr. Strayer calls my attention to a slight mistake I made. When the property is being delivered for the use of the company crane, the mill employees always use the crane to [76] operate it and set the equipment aboard the floating equipment. If the floating equipment is company equipment, then it is stowed aboard by company employees, regular employees. If it is stowed aboard somebody else's vessel, like delivery to a commercial fish company, longshoremen were employed and they stowed it. And it is just a case of whose property it is that determines what kind of employees are used.

Q. Is that a correct statement, Mr. Hawkins?

A. Yes.

Q. Mr. Hawkins, was there ever any time when someone else hired longshoremen to come aboard your equipment? A. Yes.

Q. What was that?

A. We were expanding our logging facilities and had shipped up on a commercial carrier a tractor and a big donkey and big spools of cable and other big equipment, and at the request of the agent of the steamship company we placed our barge alongside the ship so this equipment could be unloaded onto our barge rather than the dock, in as much as the trucks were not of sufficient strength

(Testimony of Eugene S. Hawkins.)

to move the equipment about when they would get it off, so they employed longshoremen to take the slings off the equipment after it was unloaded on our barge. When this operation was completed, our tug moved the barge to our dock, and our yard employees lashed it down and made it fast for [77] shipment to our logging camp.

Q. According to that, that is a case when longshoremen worked aboard your equipment?

A. That is right.

Mr. Andersen: I object. There is no necessity for counsel to make a summation of evidence.

The Court: It is not improper to embody what has already been said for the purpose of clarity.

Q. Was there any time other than the delivery to these small boats when you might pay some longshoremen for some particular service?

A. Yes.

Q. What was that?

A. That would be some instances when we had a shipment of lumber and the boat was, we will say, at the Alaska Steamship Dock and had discharged its cargo there, and rather than transport our lumber to that dock for loading we would ask the steamship company to move their vessel to our dock for loading of this lumber. Then we would pay the tie-up charges of the longshoremen to tie-up to our dock.

Q. When they were tying up to the dock, whose hawsers or tie-up would they be using?

(Testimony of Eugene S. Hawkins.)

A. The steamship company's.

Q. And they would come aboard your dock for what purpose? [78]

A. To attach these hawsers to the piling and tie-up facilities there.

Q. Was there any agreement between yourself and the steamship company as to who would pay for that extra service of moving the vessel?

A. Yes.

Q. Who? A. We were to pay for that.

Q. You were to pay the longshoremen for that?

A. Yes.

Q. Do you know how many longshoremen were hired to tie-up a vessel? A. I think two.

Q. Do you know how much was charged?

A. I believe it is two hours, or either one hour or two hours. I am not quite positive.

Q. In other words, a somewhat incidental charge for moving the vessel? A. Yes.

Q. Is that all the work that longshoremen ever did that appeared on your payrolls and your checks? A. Yes.

Q. And summarizing, is it correct to state that would simply consist of the work of delivering fish boxes and incidental lumber and materials to small boats at your dock—that [79] is, vessels owned by somebody else—and these tie-up charges?

A. Yes.

Q. Now, going back to your conversation with Mr. Albright on or about August 1st, how did the

(Testimony of Eugene S. Hawkins.)

conversation end—that is, what was the agreement between the parties; what did you say to each other?

A. Mr. Albright stated that he would contact the mill—I.W.A. officials—and see if he couldn't get them to agree to work it out so we could sign a contract also with the longshoremen and the I.W.A.

Q. Did you say anything, what you would do if he were successful? A. Yes.

Q. What did you say?

A. That, were the agreement such, we could do nothing else but that. It would be agreeable.

Q. If it was agreeable with the I.W.A.?

A. Yes.

Q. After this conversation with Mr. Albright, did he ever come back to see you again?

A. No, he never did.

Q. Did the longshoremen's committee of the Local ever come back to see you again? A. Yes.

Q. When? A. October 23rd.

Q. How do you happen to remember that particular day?

A. That was the day Mr. Card and I both arrived back from the States. I was down on a business trip and I requested Mr. Card to come back with me to assist in the signing of the I.W.A. contract that we were working on all summer and had finally gotten to a satisfactory agreement to all parties worked up.

(Testimony of Eugene S. Hawkins.)

Q. On October 23rd who was present at the conference?

A. Mr. Card and myself and Mr. Wheat and Mr. McCammon, I believe.

Q. And what—who did they say they represented—that is, Mr. Wheat and Mr. McCammon?

A. They represented a committee from the I.L.W.U., Local 16.

Q. What did they say they were there for?

A. To negotiate a contract for the work from the bull rail out.

Q. Now, at that time what work was being performed on the dock—I might ask you, was the same work you described during the Albright conversation, that was the practice then, was all that work being carried on, all those different types of loading?

A. Yes.

Q. How about the Army Engineers? [81]

A. That had discontinued then.

Q. How “discontinued”?

A. That is, in September they canceled the balance of their contract and ceased to accept delivery of any more lumber.

Q. Did that make any difference in the amounts or quantities you would have to sell to others?

A. Yes.

Q. What did you do when that occurred, and prior to October 23rd, to change the pattern of deliveries?

A. Immediately upon being notified of that de-

(Testimony of Eugene S. Hawkins.)

cision we started the instigation of barge transportation to Rupert and Tacoma.

Q. And tell me what you did in order to get ready for that operation?

A. We changed a lot of the mill around for lumber segregation and chartered and leased barges and purchased a new tugboat.

Q. Anything with respect to storage area?

A. Yes. We filled in additional storage area there that was, prior to that was useless; bought some more property, tore buildings off of it, moved buildings; and made available every foot of storage area we could in order to accumulate these customers' orders in lots preparatory to barge shipment.

Q. Were you still making all your deliveries, Mr. Hawkins, [82] by receiving an order and making up specific orders and then shipping it?

A. Yes.

Q. Was that necessary?

A. That was absolutely necessary.

Q. In other words, you couldn't take all the lumber and ship it some place and then get rid of it?

A. That is true. At this time that the Engineers stopped buying, it created a surplus so the only lumber sold and moved was lumber sold on definite order and manufactured to the customer's specification individually.

Q. Did it make any difference in the price to dispose of it that way?

(Testimony of Eugene S. Hawkins.)

A. It was considerably more that way than if we just arbitrarily manufactured lumber and sent it below in the hopes of selling it to some one in that form.

Q. When you got these barges, Mr. Hawkins, how big were they?

A. One was 110 feet long, and one was longer, and one was a B.C.L. type—two was.

Q. What is a B.C.L. type?

A. That is a shipshape barge instead of being square. It is like a ship but has no superstructure on it.

Q. How much lumber will it hold?

A. Upwards to a million and a quarter feet.

Q. How much lumber did you produce a day down there?

A. In excess of 200,000 a day.

Q. And now, Mr. Hawkins, had you started this barge loading operation at the time Mr. McCammon and Mr. Wheat came to see you on October 23rd?

A. We had just completed loading a barge.

Q. I would like to have you tell the jury how you went about loading one of these barges, with particular emphasis to the time it would take and the arrangement of the work and so forth.

A. Well, the first barge was a small one in the first place, and the orders we had to fill—we took out all the lumber which was stored from our main mill, in the storage area, put it through the re-

(Testimony of Eugene S. Hawkins.)

manufacturing plant and manufactured it to the customer's specification, and put it near our crane on the face of the dock. Now, some days we would accumulate a lot, and some days it would be three or four lots.

Q. What is a lot?

A. A lot is one carload of lumber, approximately 25,000 feet and that just fills one boxcar.

Q. Thank you. Go ahead.

A. And there was an order given this lot and a paint daub assigned to it and, when it was manufactured, when it got to 25,000 feet and was finished, the yard employees would load [84] this lot aboard the barge and until the barge was loaded.

Q. Would this loading operation be a continuous proposition? A. No.

Q. What would the men be doing the rest of the time?

A. They would be taking it to the manufacturing plant, and it would be taken from the plant to the face of the dock, strapping it, marking it and painting a daub on it, and tallying and stacking for a lot accumulation, and just that type of work.

Q. Now, how long would it take to accumulate enough lots to fill a barge?

A. Well, I believe on that particular barge it was better than a week to accumulate enough for it.

Q. If this barge was used for a week, it would necessarily constitute a storage area, would it not?

(Testimony of Eugene S. Hawkins.)

A. Yes.

Q. Was that one of the objects of using barges?

A. That was a factor in our original plans in that the area adjacent to the mill was very limited and by so using a barge we would be able to increase our storage area materially and segregation area.

Q. Was there any other reason for using a barge?

A. It was a far cheaper operation than the commercial steamship.

Q. Did you continue to ship any by commercial steamship? [85]

A. Yes. We shipped rush orders and high-priced orders that would give us enough margin to work on to ship by commercial steamship.

Q. Had your idea of the barges and cheaper operation have any significance in your future plans?

A. Yes. It was apparent that very shortly the market would be much lower because of the lack of the Engineers buying the lumber and the economic situation all over the world, as a matter of fact, for exporting which would bring the price of lumber down, and we would then have already instigated and have in motion a cheaper facilities for the movement of our lumber, the barges and tugboats and things set up to operate when this would come about.

Q. Have subsequent events proved that correct?

(Testimony of Eugene S. Hawkins.)

A. Perfectly correct.

Mr. Andersen: I object to that.

The Court: It is immaterial.

Q. Now, Mr. Hawkins, going back to your conversation now with Mr. Wheat and Mr. McCammon and Mr. Card, what was said at that meeting by the parties? This, incidentally, was October 23rd, the meeting of October 23, 1947.

A. In the first place I had requested Mr. Card to assist me in the labor management negotiations here and I requested that he be the principal speaker and take care of this meeting that we had on and why we were sitting there, and [86] what little I added along with it, I can relate.

Q. All right. Relate what the longshoremen said they wanted.

A. The longshoremen said they wanted again all the work from the bull rail out plus the barge loading. We had just completed loading then, and we had used our employees at it, and they requested that work.

Q. Did they say anything about an agreement?

A. And they wanted this agreement signed up for this purpose to include all that.

Q. Did they say who would be parties to that agreement?

A. Yes. The I.L.W.U. 1-16 and the Juneau Spruce Corporation.

Q. What was said by the Company representatives?

(Testimony of Eugene S. Hawkins.)

A. That we had recognized the I.W.A. as the exclusive bargaining agent; they had shown us their signatures and verified the fact they were representative of a majority of the employees; and that we had during the summer months negotiated a contract agreeable between both parties and were in the process of signing it then; and, in view of that, we couldn't bargain with their union.

Q. Now, was that the sum and substance of that part of the subject? A. Yes.

Q. Was there anything else said at the end of the conversation regarding any particular job on the dock or any particular work that had been done? [87] A. No.

Q. Do you remember, Mr. Hawkins, something about carrier blocks?

A. Oh, yes. That was the outset of—I should say, the tail end of what had transpired during my absence.

Q. Just say what was said then.

A. What was said then was that they wanted us to employ two longshoremen and a boss to remove the carrier blocks after our lumber had been taken off these blocks and put on the commercial steamship.

Q. Mr. Hawkins, tell us this—what is a carrier block; and what is a carrier, first?

A. A carrier is a piece of equipment that straddles a package of lumber, raises and transports it from one place to the other.

(Testimony of Eugene S. Hawkins.)

Q. Those big yellow machines we see running around here? A. Yes.

Q. What are the blocks?

A. The blocks are a specially built piece of wood that the lumber sits on and makes the carrier able to hook on and thereby raise this package of lumber and keeps the edges clear from the ground so it don't get hooks in them.

Q. Were these carrier blocks used when you delivered to commercial steamers at your dock?

A. Yes. [88]

Q. Tell me what happened to the blocks in the process of delivering it to the bull rail.

A. It would be underneath the package of lumber until it got to the bull rail and, when the lumber was lifted off, it would be left sitting on the dock.

Q. The lumber carrier and lumber and blocks would go to the bull rail, and the carrier would just drop it and go away? A. Yes.

Q. And the longshoremen would hoist it aboard the steamer? A. Yes.

Q. Did you or the Juneau Spruce Corporation hire the longshoremen to attach the sling and hoist it aboard the steamer? A. No.

Q. That would leave the carrier block sitting there; is that true? A. Yes.

Q. What was it they were referring to when they spoke about these carrier blocks, what work in connection with it?

A. In order to make room for the carrier to deliver another load there, these carrier blocks had

(Testimony of Eugene S. Hawkins.)

to be removed from that particular spot and stacked up and, when there got to be a lot, the carrier would take them back to the mill yard for other lots.

Q. How much do carrier blocks weigh? [89]

A. Maybe 15 pounds.

Q. 15 pounds? A. Yes.

Q. What work did they want with respect to those blocks?

A. They wanted the job of stacking them up preparatory to making a package of them for the carrier.

Q. Were these slingmen hired by the steamship company there? A. Yes.

Q. And they wanted two more men to lift the blocks aside? A. Yes.

Q. What had been done prior to that time regarding carrier block men?

A. When it was lifted off, there was nothing to do but stand and wait so they picked them up themselves and throwed them over in a pile.

Q. They wanted two men to lift a 15-pound block and put them in a pile? A. Yes.

Q. What was said at the meeting regarding carrier block men?

A. They had sent down some men to do this work on their own accord and at this meeting they wanted to know if we were going to pay them for it. We said, in as much as we never ordered the men to come down and never requested it and they

(Testimony of Eugene S. Hawkins.)

sent men down to do work we had not assigned, that we would not pay the men for it. [90]

Q. Was that the end of the conference?

A. Yes.

Q. Did they make any remark after you had informed them of it?

A. That they would see about who would pay what.

Q. That they would see about who paid for what? A. Yes.

Q. Was there any other conference with any other labor union that day? Just a minute—going back—I will withdraw that last question—to the conference of the 23rd; was there any discussion or any statements made by either side as to whether or not there were any longshoremen employed there then? A. No. There was—

Mr. Andersen: I submit that answered the question. The question was asked and answered, may it please the Court. He said, "No."

The Court: Yes.

Q. Calling your attention particularly to Mr. Card, did he question anybody there as to longshoremen, whether they were being employed by the company or not? A. Yes.

Q. He was new here, was he not? A. Yes.

Q. Who did he ask, and what did he ask? [91]

A. He asked the representatives of 1-16 if they represented any of our employees, and they said, "No."

(Testimony of Eugene S. Hawkins.)

Q. That is all. Now, did you have any other meeting with any other union committee?

A. Because of that situation being brought up, we requested a meeting with the shop committee of the I.W.A. immediately after closing time that night.

The Court: Before we go into that, I think it is time to adjourn. This seems to be a good place. Ladies and gentlemen of the jury, you are again admonished not to talk about this case with anybody, nor among yourselves, nor to permit anybody to talk to you about it and, if anyone should attempt to talk to you about the case, you should immediately warn him you are on the jury and, if he persists, you should report the matter immediately to the Court. You are also not to arrive at any opinion or express any opinion until the case is finally submitted to you for your deliberation. I also deem it necessary that you refrain from reading newspapers regarding this case or any related case. Your decision or verdict in this case will have to be arrived at from the evidence that is produced here before you and the law as given to you by the Court, and you should refrain from reading anything that might influence you in any manner.

(Whereupon, the case was adjourned until 10:00 o'clock a.m., May 2, 1949, reconvening as per adjournment, with all [92] parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

(Testimony of Eugene S. Hawkins.)

Mr. Strayer: If the Court please, may I ask counsel for defendants if they have the records we discussed yesterday?

Mr. Andersen: No.

(Whereupon, the witness Eugene S. Hawkins resumed the witness stand and the Direct Examination by Mr. Banfield was continued as follows:)

Q. Mr. Hawkins, last Friday you finished your testifying, stating there had been a meeting on October 23, 1947, with the committee from the long-shoremen's Local 16. Now, on that same date did you have a conference with any other union committee? A. Yes.

Q. Tell me who was present at that conference.

A. For the I.W.A. Tim O'Day and Glen Kirkham.

Q. Were there any other representatives for plaintiff? A. And Gene Card.

Q. Who is Gene Card?

A. A Personnel Manager of the Coos Bay Lumber Company and Labor Management Adviser to the Juneau Spruce Corporation.

Q. Will you tell us what was said at that meeting? A. That meeting was held——

Mr. Andersen: May it be noted that the same objection [93] is made as hertofore, immaterial and hearsay and incompetent so far as the defendants are concerned?

(Testimony of Eugene S. Hawkins.)

The Court: The record may so show, and the same ruling.

A. In the afternoon; that was in the evening, of the same day, we had the meeting with the long-shoremen at which the question of barge loading was brought up. And Mr. Card and myself had requested this meeting with the I.W.A. for the purpose of asking them if they included barge loading in their work, and we were advised that they did but that to be sure of everything they would send a wire to their International and request their authority on it.

Q. At that time was there a barge being loaded?

A. We had just completed loading the first barge.

Q. And at that time were there any negotiations regarding a contract with the I.W.A.?

A. As a matter of fact at that time we had completed the agreement on this contract.

Mr. Andersen: I move that be stricken as an opinion of the witness.

The Court: Objection overruled.

Q. Mr. Hawkins, are you now speaking about Plaintiff's Exhibit No. 2 as the agreement which you completed?

A. Yes; this is the one which we completed.

Q. What is the date of that agreement? [94]

A. November 3, 1947.

Q. Were the terms of this agreement agreed to at the meeting of October 23rd, or was it agreed to with certain exceptions; tell us to what extent—

(Testimony of Eugene S. Hawkins.)

Mr. Andersen: May the same objection run to this line of questioning, without objecting to each question?

The Court: Yes. It should be shown whether Plaintiff's Exhibit 2 embodies the entire agreement arrived at from earlier meetings.

Mr. Banfield: I will withdraw the previous question.

Q. Does the Plaintiff's Exhibit 2 embody the terms of the agreement arrived at October 23rd, or were there some exceptions or differences?

A. The agreement had been agreed upon prior to October 23rd.

Q. Completely in all its phases?

A. Yes; the only exception being that the I.W.A. though desired to send the agreed-upon agreement to their International for ratification and return for signing, and which was done. It was brought back on the 3rd of November. Had it not been for that, it would have been signed earlier.

Q. In this Agreement of November 3rd it is stated that: "The Union is hereby recognized as the sole and exclusive collective bargaining agent for all the employees of the Employer in its saw-mill, manufacturing and retail departments at Juneau, Alaska, excluding superintendents, foremen [95] and office employees, on all matters pertaining to wages, hours of labor and other conditions of employment in the aforesaid plant, subject to the provisions of Article II as provided in this

(Testimony of Eugene S. Hawkins.)

Agreement." Article II is that dealings would be through a Plant Committee, the Shop Committee. Was that particular provision of that contract discussed at the meeting of October 23rd?

A. Yes.

Q. What was said regarding it?

A. Since it was agreeable with all concerned that the I.W.A. include barge loading in their scope of the processing of lumber, it was thought it should be included—barge loading—in that paragraph; and if that being the case, we felt we would also have to include machine-shop and powerhouse employees and departments—we were expanding still at that time—and we would have to leave provisions for new departments and exclude departments we ceased to use, and it would be a quite lengthy matter. Rather than go through this process, we thought to use the language in there of all employees, then it would include everyone employed by the Juneau Spruce Corporation.

Q. You mean everyone employed, or were there any exceptions, being any exceptions to those employed—I believe you testified before regarding people away from Juneau?

A. That would be the exception—of our boats and logging camp. [96]

Q. In other words, you mean to imply it would be the entire personnel of Juneau? A. Yes.

Q. Now, after this meeting did the I.W.A. present the contract for any purpose?

(Testimony of Eugene S. Hawkins.)

A. For signing only.

Q. And when was that?

A. On November 3rd. I wasn't present at the signing.

Q. Did you leave authority for someone to sign on your behalf? A. Yes.

Q. And was it actually signed on behalf of the Juneau Spruce Corporation? A. Yes.

Q. By whom? A. Gene Card.

Q. Was there any subsequent barge loading in 1947? A. Yes.

Q. What did that consist of?

A. We loaded a barge out in—I think probably several barges. I just don't remember how many it was; consisting mainly of clears and shops.

Q. What do you mean by "clears"?

A. That is the better grade of lumber, the higher priced lumber. [97]

Q. Why do you call it "clears"?

A. It is lumber free of knots or materially so.

Q. What do you refer to as "shops"?

A. Shop type lumber is used in manufacturing of furniture and doors and windows. It has knots in it but so spaced as to leave clear cutting between the knots.

Q. Is that poor quality or good quality?

A. The second most expensive type of lumber.

Q. Who loaded these barges that went out with this type of lumber in 1947?

A. Our mill employees.

(Testimony of Eugene S. Hawkins.)

Q. Did they move it up to the face of the dock?

A. Yes.

Q. Who operated the crane?

A. Our yard employees.

Q. And who stowed it aboard the barges?

A. Our yard employees.

Q. Were there any members of Local 16 employed or who worked at the Juneau Spruce Corporation on the plant or property after this meeting of October 23rd? A. No.

Q. Does that hold good as long as you were there as Manager? A. Yes.

Q. Was there ever any further discussion that year with the I.W.A. as to their doing this work?

A. No.

Q. Now, in 1948—first—I will withdraw that. First, was there any other meeting with the I.L.W.U., Local 16, or any representatives on their behalf during 1947? A. No.

Q. When was the next meeting.

A. In April of 1948.

Q. In April? A. Yes.

Q. How long would that be before the strike or the picket line?

Mr. Andersen: I object. I move to strike the word "strike."

Mr. Banfield: I will withdraw the question.

Q. How long before the picket line was established did you have a meeting with the I.L.W.U.?

A. One day.

Q. Mr. Hawkins, I would like to ask you if

(Testimony of Eugene S. Hawkins.)

there wasn't some other meeting between October 23rd and the date the picket line was established?

A. Yes. It was a little earlier than that.

Q. What month would you say?

A. The latter part of the month prior.

Q. In March? A. Yes. [99]

Q. Who was present at that meeting?

A. Mr. McCammon; Mr. Ellis.

Q. Who was Mr. McCammon now?

A. Of the I.L.W.U., Local 1-16.

Q. Who was Mr. Ellis?

A. State Steamship Company.

Q. Was Mr. Ellis here—for what purpose was he at this meeting?

A. I had requested that he come up to assist us with the barge operation, and loading and unloading techniques, and so on.

Q. Did you ask him to be present at this meeting? A. Yes.

Q. Was there anyone else present besides Mr. Ellis and Mr. McCammon and yourself?

A. Mr. Stamm; and two other longshoremen—Mr. Wheat, I believe; I don't recall the third one right now.

Q. Do you remember Mr. McCammon at this particular meeting definitely?

A. We had quite a few meetings right in a short time there. I believe he was there, but I wouldn't be positive. There were three representatives of Local 1-16 there.

(Testimony of Eugene S. Hawkins.)

Q. Did they say they represented Local 1-16?

A. Yes.

Q. What occurred at this meeting with Mr. Ellis? [100]

A. They asked if we were of the same opinion regarding barge loading as we had stated previously, and I replied, yes, we were.

Q. Was there any discussion at that time regarding signing a contract?

A. No; that wasn't mentioned.

Q. Now, when they said "previous" meeting, what did they mean? What did you take that to mean?

Mr. Andersen: That calls for a conclusion of the witness, may it please the Court, unless there was some discussion about it.

The Court: Yes. You can ask him when the previous meeting was.

Q. What previous meeting was referred to?

A. Whereby they asked for the signing of a contract, both coastwise and local, for the work of handling our products from the bull rail out.

Q. What was your reply to this proposal—request?

A. That we had recognized the I.L.W.A. as exclusive bargaining agent, and thereby couldn't bargain with any other union for that work.

Q. I think in your statement there you said you told them you had made an agreement with the I.L.W.A.; what do you mean?

(Testimony of Eugene S. Hawkins.)

A. I.W.A. I got the wrong letter in there.

Q. You mean Local M-271? [101]

A. Yes.

Q. In other words, it constituted a refusal on the part of this Local to give them the work?

A. Yes.

Q. Was anything further said at that meeting, or was that the end of it?

A. As they went out the door they remarked, "We will see whether or not" we would talk with them about it in the future.

Q. Between this meeting on October 23rd and the meeting in late March had the mill operated all the time? A. No.

Q. Tell us why not and for what period.

A. It was down from about the 21st or 22nd of December until about the 1st of March for repairs and because of the snow and etc.

Q. By being "down" you mean the mill was closed and no lumber was being produced?

A. Yes.

Q. Did it operate continuously after the 1st of March?

A. No. We started up and there come another big snow. We shut down for another two weeks and then reopened.

Q. At the time they asked for this meeting or came to see you in March, was the mill operating?

A. No, I don't believe it was. [102]

Q. Were you loading a barge at that time?

A. Yes.

(Testimony of Eugene S. Hawkins.)

Q. Now, tell me when was the next meeting after this one in March?

Mr. Andersen: With whom?

Q. With anyone; any union?

A. It would be very shortly before the picket line was put on, one or two days; I don't recall.

Q. What was the date the picket line was put up?

A. The 10th day of April.

Q. Who was present at this meeting one or two days before April 10th?

A. Mr. Banfield, Mr. Stamm, and I.L.W.U. representatives.

Mr. Andersen: I am going to object to that.

A. Mr. McCammon, I am sure, was one.

Mr. Andersen: I object to the conclusion of the witness as to the I.L.W.U. unless they designated——

Mr. Banfield: We will show that.

Mr. Andersen: It may be stricken then, I assume?

The Court: I think he can state it now. You can cross-examine him on it. Objection is overruled.

Q. Do you remember the names of the I.L.W.U. representatives?

Mr. Andersen: I assume you mean I.L.W.U., Local 16, representatives?

Q. Yes. Local 16 representatives? [103]

A. Mr. Wheat and Mr. McCammon.

Q. Let me ask you, Mr. Hawkins, did Mr. Wheat

(Testimony of Eugene S. Hawkins.)

continue in these final negotiations, do you know?

A. No, I don't know. As I have stated previously, we had quite a bit of confusion at the time, and I am not very good at remembering names, and I wouldn't want to be positive at all times of the names.

Q. Mr. Joe Guy was present at any of these meetings?

A. Yes, he did. That is the one I couldn't think of a while ago.

The Court: Which? He said, "a moment ago."

Mr. Banfield: I said either of these meetings.

Q. You said you were referring to a "while ago"; what meeting was it Mr. Guy attended?

A. He attended the last two meetings.

Q. The last two. Do you know Mr. Pearson?

A. Yes.

Q. Did he attend any meetings?

A. Yes, he did.

Q. What did he attend?

A. He was at the last two meetings also.

The Court: That is instead of who now?

Q. Are you sure Mr. Wheat was at the last two meetings? A. No, I am not.

Q. Could he have been there? [104]

Mr. Andersen: I object, may it please the Court.

Q. Or are you certain?

Mr. Andersen: Did the Court rule on my objection?

The Court: Objection overruled.

(Testimony of Eugene S. Hawkins.)

A. Now that the names are brought up again, I know there were only three, and I do know Mr. Guy was there and Mr. Pearson.

Q. Are you sure about who the other one was?

A. I would know his name again. I said it a minute ago and forgot it again.

The Court: Do you mean McCammon?

A. McCammon; yes.

Q. Were those persons present at both the last two meetings? A. Yes.

Q. Who are those three men?

A. They said they were the Shop Committee and officers of the I.L.W.U. 1-16.

The Court: This Union has been referred to as 1-16 repeatedly. I understand it is 16.

Mr. Andersen: It is interchangeable, I think.

Mr. Banfield: It was explained that it was District 1 of the I.L.W.U.; and at one time there were other districts, but for several years that has been the only district in the I.L.W.U. They dropped the one. It is just Local 16. Local 42 was so affiliated that it had different districts; and it [105] was prefaced by "1." It is interchangeable.

The Court: It still wouldn't be the number, would it—referring to the district?

Mr. Andersen: We will stipulate—1-16 or 16—it means this Union in Juneau, your Honor. Isn't that correct, Mr. Banfield?

The Court: Very well.

Mr. Banfield: Correct.

(Testimony of Eugene S. Hawkins.)

Q. Now, Mr. Hawkins, what took place at this meeting just before April 10th?

A. The longshoremen and I.W.A. officers at that time came in to stipulate that they were placing a picket line at our plant and that the I.W.A. employees would not go through the line.

Q. You said two groups came in to stipulate. What do you mean? Who was putting the picket line on? One or both?

A. The longshoremen were putting the picket line there.

Q. What did the I.W.A. tell you at this meeting?

A. That they, being a union, would have to recognize the picket line.

Q. Did they give you any reasons why they would have to recognize it?

A. Yes. They said that for peace sake, etc., they had agreed to give that work to the longshoremen at that time.

Q. Was the mill operating at that time? [106]

A. Yes.

Q. Did the I.W.A. tell you how they had arrived at this decision or what action had been taken to make this decision?

Mr. Andersen: Could I interrupt? A better foundation should be laid so far as persons present, are concerned. Was it the meeting at which Mr. Banfield was present, and Mr. McCammon was present, Joe Guy was present, and Mr. Pearson was present? There was no reference to any representative of the I.W.A. I assume it is the same meeting.

(Testimony of Eugene S. Hawkins.)

The Court: The reference was to a committee of the I.W.A. No names were specified. You wish the names?

Mr. Andersen: Yes, your Honor.

Q. Who was present there representing the I.W.A.?

A. Mr. Peterson was spokesman for the representatives.

Q. Do you know whether or not he was an officer of the I.W.A.?

A. He was Secretary, I believe he said.

Q. Do you know who the other I.W.A. men were?

A. There was one fellow—oh, I forgot his name; another was Big Tim O'Day.

Q. Did they tell you how this decision was arrived at? A. Yes.

Mr. Andersen: The same objection as to hearsay, may it please the Court, particularly so far as the International is concerned.

The Court: Is it very material how they arrived at [107] it? After all it seems to me the important thing is that it was arrived at, and not the process by which it was arrived at.

Mr. Banfield: I think the Court is right.

Q. Did they state at this meeting anything they would do after this meeting other than recognize this picket line? A. No; I don't recall.

Q. What happened on April the 10th?

A. The longshoremen placed a picket line at the entrances of our plant.

(Testimony of Eugene S. Hawkins.)

Q. How many pickets were there?

A. Four.

Q. Where were they placed?

A. One at the main entrance and one at another entrance in the vicinity of our power plant and machine shop; two in each place.

Q. Did they carry any signs? A. Yes.

Q. Was there anything on the signs?

A. Yes.

Q. What was on it?

A. At the top was, "I.L.W.U., Local 16, locked out by Juneau Spruce Corporation."

Q. And how long did the pickets remain at both places? A. Just a few days. [108]

Q. And after that were there still pickets there?

A. At the main entrance; yes.

Q. How long did they stay at the main entrance of the plant? A. They are still there.

Q. Were they there all the time that you were manager of the plant? A. Yes.

Q. How many hours a day did they picket?

A. Twenty-four.

Q. Now, at the time that this picket line was established, what was your intention with respect to operating the mill—that is, the extent of the operation that you intended to carry on?

A. Up to that time, since the inception of the company, we had been gradually getting our equipment and lines of supply in shape to efficiently saw and handle 50,000,000 feet for the year of 1948.

(Testimony of Eugene S. Hawkins.)

Q. Would that be 50,000,000 feet of logs or 50,000,000 feet of lumber?

A. That would be 50,000,000 feet of lumber.

Q. Mr. Hawkins, what preparations had you made within the mill itself?

A. We had to lengthen the green chain to facilitate sorting. We acquired more storage space, and things too numerous to mention. [109]

Q. What had you done regarding the log supply?

A. We had—by that time we had completed our logging camp installation. All the equipment was there. The logging road was built. And our own operation was put out 25,000,000 that year. Our government contract specified a minimum of 20,000,000 feet. And we had assisted financially at other points numerous gyppo-loggers—or contract loggers, maybe should be the term—to produce for us, whose aggregate amount would have been considerably more than 25,000,000.

Q. In other words, you mean you would have a supply of 50,000,000 feet for 1948? A. Yes.

Mr. Andersen: I object to that. That is the best potential, according to the witness. I think it is leading and suggestive on the part of counsel. I move it be stricken.

The Court: I think it embodies what has already been testified to. Objection overruled.

Q. Mr. Hawkins, how would the grade of this lumber in 1948 run as compared to the grade in 1947?

(Testimony of Eugene S. Hawkins.)

A. We had just moved into on Kosciusko Island in the Edna Bay vicinity in the best, biggest and best block of timber in Southeastern Alaska.

Q. Who were you buying that timber from?

A. From the Forest Service. [110]

Q. How much were you required to purchase from the Forest Service per year?

A. A minimum of 20,000,000 feet.

Q. How would the quantity of the lumber run in that area as compared with what you sawed on the average in 1947?

A. The amount of uppers, which is shops and clears, would have tripled the previous year from the other areas.

Q. Did you actually cut any timber at Edna Bay? A. Yes.

Q. And how much did you cut?

A. 10,000,000 feet.

Q. By what date did you have 10,000,000 feet at Edna Bay?

A. We had that much cut by, well, about March 15th.

Q. And tell me, was there a union organized at Edna Bay? A. No.

Q. Was there one organized elsewhere that had jurisdiction at Edna Bay? A. No.

Q. Were the loggers at Edna Bay members of any union? A. No.

Q. Mr. Hawkins, was there a time when there was a strike at Edna Bay? A. Yes.

(Testimony of Eugene S. Hawkins.)

Mr. Andersen: I object to this. I can't see the relevancy of it at all. [111]

The Court: True; but I assume it is preliminary.

Mr. Banfield: It is, if the Court please.

Q. When was that strike there?

A. Just a few days prior to April 10th.

Q. Prior to the picket line here? A. Yes.

Q. And was that strike settled? A. Yes.

Q. How soon?

A. I would say a few days after the 10th; possibly the 15th or 20th.

Q. Did the men during the period of this negotiation take any action through any union?

Mr. Andersen: Unless relevancy is stated, I am going to object that there is no relevancy and for the further reason that this is obviously hearsay. No foundation has been laid at all, save and except for hearsay. So far as the witness is concerned, he already stated that during this time he was in Juneau. Now, I don't know how far Edna Bay, Alaska, is. But distances in Alaska are usually quite long; at least that is my experience since I have been here. I move it be stricken as hearsay.

The Court: What is the purpose?

Mr. Banfield: If the Court please, I can show and will show by laying a foundation what Mr. Hawkins did as far [112] as the Juneau Spruce Corporation is concerned.

The Court: Repeat the question.

Court Reporter: "Did the men during the pe-

(Testimony of Eugene S. Hawkins.)

riod of this negotiation take any action through any union?"

Mr. Andersen: Obviously it is calling for the conclusion and opinion of the witness.

The Court: That may be, if it is just a guess. He may have personal knowledge. On your promise that it is relevant or that you will connect it up with something relevant——

Mr. Banfield: I will withdraw the question regarding the strike.

The Court: You already asked him. He testified there was one and it was settled.

Q. Mr. Hawkins, were you in charge of the Edna Bay operation? A. Yes.

Q. And have you personal knowledge of what you testify regarding the labor conditions at Edna Bay? A. Yes.

Q. Did you negotiate the settlement of this strike? A. Yes.

Q. How was it settled?

A. The employees of the camp presented us with their signatures representing more than 50% of the employees as belonging to the I. W. A. Union and designated them as the bargaining agent for them.

Q. Now, which I. W. A.?

A. It was the Ketchikan local.

Q. And then was there an agreement made?

A. Yes.

Q. And with whom?

A. With the I.W.A. Local, Ketchikan local.

(Testimony of Eugene S. Hawkins.)

Q. Did you have a steady labor supply at Edna Bay? A. Yes.

Q. And was the camp all set up ready to operate? A. Yes.

Q. Would you have any difficulty getting 50,000,000 feet of logs, any difficulty getting fifty—

Mr. Andersen: I am going to object to that as a conclusion and opinion of the witness.

The Court: If you know, you can state.

A. Under the least favorable conditions—

Mr. Andersen: I move that be stricken. It is not responsive to the question, may it please the Court.

The Court: Just state what your ability would be with conditions as they were, not under the least favorable conditions.

A. We could get considerably more than 50,000,000 feet.

Q. How many logs were on hand here in the harbor?

A. At the time of the strike, on hand and on the way here in tow of our boats, a total of 10,000,000 feet. [114]

The Court: Well, now, it isn't clear, I don't think, whether the capacity of 50,000,000 feet is limited to Edna Bay or to all operations.

Mr. Banfield: If the Court please, I think he quite clearly stated, but I can bring it out more clearly for the Court's benefit.

Q. How much of this 50,000,000 feet did you intend to cut in 1948 from Edna Bay?

(Testimony of Eugene S. Hawkins.)

A. 25,000,000 feet from Edna Bay.

Q. How much could you get from other sources?

A. In excess of 25,000,000.

Q. Had you made contracts or agreements for these logs from other sources? A. Yes.

Mr. Andersen: I am going to object to that. The documents would be the best evidence whether there was an agreement or what they may be.

The Court: Objection overruled.

Mr. Banfield: If counsel would wait——

Q. Were the agreements in writing or verbal?

A. For the most part, not verbal.

Q. If they were not verbal, what did they consist of?

A. A letter. I answered several letters to various loggers stating that we would——

Mr. Andersen: May it please the Court, the letters [115] would be the best evidence of what they stated.

Q. Now, Mr. Hawkins, on April 10th or prior thereto was it operating in 1948?

A. None whatsoever.

Q. How did you learn—I will withdraw that question. During what season of the year can you ordinarily operate the mill at Juneau?

A. We had in the course of changing the mill about made provision whereby we could run as long as possible in regard to snow.

Mr. Andersen: I move that be stricken. It is not responsive. I submit the question itself should be answered..

(Testimony of Eugene S. Hawkins.)

The Court: I assume his answer wasn't completed, but it seemed to me he was going on from there.

Q. During what period then, would you be closed down?

A. From the time the snow got one foot deep until it got back to one foot.

Q. Approximately how many months would that be in the winter?

A. Between two and three.

Q. Now, Mr. Hawkins, I believe you testified you had 10,000,000 feet cut at Edna Bay April 10, 1948. Had any of those logs been cut in the water or towed to Juneau?

A. We had put some in the water.

Q. About how many? A. About 250,000.

Q. Leaving about 9,750,000 at Edna Bay on the ground. A. Yes.

Q. Was that in addition to the 10,000,000 feet either being towed to Juneau or already in Juneau in the harbor? A. Yes.

Q. Have any of those logs you had on hand April 10, 1948, at Edna Bay been moved from there since?

A. No.

Q. Have any of the logs in the harbor April 10th or being towed here been sawed or disposed of in any manner? A. Some were sawed.

Q. Where are the remainder?

A. At various log storage areas.

Q. Where?

(Testimony of Eugene S. Hawkins.)

A. Across the Channel and down by Thane.

Q. Did you ever issue any orders to anyone at the mill with respect to further employment of longshoremen?

A. Yes.

Q. When were such orders issued?

A. The first few days of October.

Q. And to whom was that order issued?

A. To George Schmidt.

Q. What was his position?

A. Assistant Manager.

Q. And what was the order? [117]

A. I was in Seattle at the time. I sent a wire stating for him——

Mr. Andersen: May it please the Court, I will object to the answer. The wire would be the best evidence of what was conveyed to Mr. Schmidt.

The Court: I don't know that it is the identical words that are intended to be gotten into evidence. It is what was the order.

Q. What was the order in effect?

A. To not hire any more longshoremen regardless of for whose account. I believe that was the gist of it.

Q. Why did you issue this order?

Mr. Andersen: I object. It is incompetent, immaterial and irrelevant, may it please the Court.

The Court: Objection overruled.

A. Mr. Schmidt had wired me—wrote a letter that a committee of the local longshoremen——

Mr. Andersen: I object to this as not the best evidence.

(Testimony of Eugene S. Hawkins.)

Q. Do you have the letter he wrote to you?

A. Yes.

Q. The original letter he wrote to you?

A. A copy of it.

Q. Do you have the original?

A. I believe so. [118]

Q. Where is it, do you know?

A. It would be in the files of the Juneau Spruce Corporation.

Q. And you brought the original back to the office here in Juneau from Seattle and filed it?

A. Yes.

Q. Are you sure that it is in the files of the Corporation; do you know of your own knowledge that it is there?

A. No.

Mr. Banfield: If the Court please, I have not been able to find the original, but I do have from the files what appears to be a copy. Will counsel stipulate to the use of the copy?

Mr. Andersen: If you lay a foundation——

Mr. Banfield: We will ask the privilege of calling——

The Court: You can put it in and have it marked for identification.

Mr. Andersen: I also want to object on materiality.

The Court: I doesn't seem material to me, but I assume counsel wouldn't be going into it if it was not material. If you think it is material to your case, have it marked for identification now

(Testimony of Eugene S. Hawkins.)

and examine the witness regarding it and then have it introduced as an exhibit.

Mr. Andersen: Could I have counsel state the materiality?

Mr. Banfield: Yes. For the purpose of showing a [119] further demand was made to Mr. Schmidt that employment be given those longshoremen to load those barges.

The Court: The same already given?

Mr. Banfield: No; not to Mr. Hawkins, but to Mr. Schmidt, and he communicated it to Mr. Hawkins, and Mr. Hawkins——

The Court: It is immaterial what officer of the plaintiff corporation or what demand was made if they merely reiterated the former demand.

Mr. Banfield: True, it is similar to those previously in evidence, but it is another incident, and we want to show what Mr. Hawkins did, while he is here on the witness stand, as a result of Mr. Schmidt's communication to him.

Mr. Strayer: If I may interrupt, the testimony here has shown in the past the practice had been for longshoremen to load some types of vessels—fishing boats and cannery tenders—where longshoremen were engaged to accommodate the owners of those vessels. Mr. Hawkins testified he ordered that there be no more longshoremen for any purpose. I think it is in the order, showing why he gave the order. This explains the order.

Mr. Andersen: I don't believe the why is important.

(Testimony of Eugene S. Hawkins.)

The Court: It is impossible to tell at this stage how material the letter is that resulted in the order. If it is material, you may have it marked for identification.

Clerk of Court: Plaintiff's Exhibit 5 For Identification. [120]

(Whereupon, Court recessed for five minutes, reconvening as per recess with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows: the witness Eugene S. Hawkins resumed the witness stand and the Direct Examination by Mr. Banfield was continued as follows:)

Q. Mr. Hawkins, when you gave this order, what was your reason for giving the order?

A. Well, there was one reason——

Mr. Andersen: I object to the reasons as being purely conclusions of the witness, incompetent, irrelevant and immaterial.

Mr. Banfield: What a man has in mind for doing something isn't a conclusion; it is a fact.

The Court: Objection overruled.

A. The one reason was I was going to return in a short time and bring Mr. Card with me, and that they had caused so much trouble and things prior to that, I thought it was best if we just didn't have any more relations in any way.

Q. Did any persons employed by the Juneau Spruce Corporation in March or April, 1948, participate in the picket line?

(Testimony of Eugene S. Hawkins.)

Mr. Andersen: Will you repeat that question, Miss Reporter?

Court Reporter: "Did any persons employed by the Juneau Spruce Corporation in March or April, 1948, participate [121] in the picket line?"

Mr. Andersen: I object on the ground that it calls for a conclusion of the witness. There is nothing showing this gentleman was here during all that time.

The Court: It would be predicated of course on the assumption that he would have personal knowledge, otherwise he couldn't answer, obviously.

Mr. Banfield: If the Court please, the witness testified the picket line was there twenty-four hours a day as long as he was Manager and he testified he was Manager from April 10th until June 1, 1948.

The Court: It seems to me though that your question ought to take in the entire period. Why pick out one period and not the other months?

Mr. Banfield: The picket line wasn't established until April 10th and he left June 1st.

The Court: I thought you said "March or April."

Mr. Banfield: 1948.

Q. Did any persons employed by the Juneau Spruce Corporation during March or April, 1948, participate in this picket line after it was established on April 10th? A. No.

Q. Did any person employed by the Juneau Spruce Corporation after October 23, 1947, partici-

(Testimony of Eugene S. Hawkins.)

pate in this picket line after April 10th? [122]

A. No.

Q. At this meeting of October 23rd, at which, you testified, Mr. Card and the I.L.W.U. committee was present, do you remember what was said at the end of that meeting by the longshoremen's committee as it left?

Mr. Andersen: I submit, may it please the Court, that has already been asked and answered.

The Court: I thought it was asked and answered.

Q. Do you know of anything else in addition to which you have already testified? A. Yes.

Q. What?

A. They stated as they left that they would see to it that our barges never got unloaded at their destination if longshoremen weren't hired to load them here.

Q. Did barge loading require any special skill?

A. No.

Q. Now, Mr. Hawkins, after November 3, 1947, if a man was employed at your mill, how could he bargain with you?

Mr. Andersen: I fail to see the materiality of this, your Honor.

The Court: I assume it is preliminary.

Mr. Banfield: If the Court please, it is. What I am trying to bring out at this time is the relationship between the mill employees and the Company, and all of them, [123] under the terms of

(Testimony of Eugene S. Hawkins.)

this agreement. In other words, what was the actual practice after this agreement went in effect of collective bargaining. One of the contentions of the longshoremen was that they be hired and bargain through the Longshoremen's Union. I want to show what the practice was under this contract.

The Court: You may proceed.

A. They would make an appointment through their foreman or by the office force to talk over their grievances with me, and I would iron it out.

Q. You mean to imply the men deal individually directly with you? A. Yes.

Q. Is there any other way they could take up a grievance or some request?

Mr. Andersen: The question has been asked and answered. He asked the practice.

Mr. Banfield: He testified to a practice. I am asking if there is any other method.

The Court: You may answer.

A. Through the Shop Committee of the I.W.A.

Q. Now, that would be for an individual to bargain with you; he could do it directly or through the I.W.A.; is that correct? A. Yes. [124]

Q. If a group of employees wanted to bargain with you, how could they do it?

A. Through the I.W.A.

Q. Could they collectively bargain with you any other way except through that Union?

A. No.

Q. Did the mill during the time you were Mana-

(Testimony of Eugene S. Hawkins.)

ger maintain a time clock? A. Yes.

Q. Did the longshoremen ever punch the time clock? A. No.

Q. Did the other employees punch a time clock? A. Yes.

Mr. Banfield: That is the direct examination of the witness. You may cross-examine.

Cross-Examination

By Mr. Roden:

Q. Mr. Hawkins——

Mr. Andersen: Could I interrupt just a moment? At this point, so far as the International is concerned, I want to renew my motion to strike each and all of the testimony of Mr. Hawkins. No foundation was laid, so far as the International is concerned, for the admission of the testimony.

The Court: I don't think you can consider the testimony of each witness alone. He has to show the relation to other testimony.

Mr. Andersen: I knew it would be denied at this time, but I thought it was the appropriate time to renew the motion.

The Court: The motion is denied.

Q. Mr. Hawkins, did I understand you to say you became Manager the 1st of April, 1947?

A. No. I think it was——

Q. When did you become Manager?

A. I think it was the 1st of May.

Q. The 1st of May, 1947? A. Yes.

Q. You at that time were Vice President of the Company? A. Yes.

(Testimony of Eugene S. Hawkins.)

Q. How long did you continue as Manager?

A. Until June 1, 1948.

Q. Are you still an officer of the Juneau Spruce Corporation? A. Yes.

Q. What position do you occupy?

A. Vice President.

Q. And you are the gentleman who negotiated the deal for the Juneau Spruce Corporation to purchase the assets of the Juneau Lumber Mills; is that correct? A. Yes. [126]

Q. When did you first come to Juneau?

A. In July, 1946.

Q. In July, 1946. Did you then start negotiations with Mr. Rutherford? A. Yes.

Q. Mr. Rutherford was practically the sole owner?

Mr. Banfield: If the Court please, this is improper cross-examination. The witness has not testified regarding the negotiations leading up to the sale and purchase at all. He started his testimony at the time of the actual take-over and actual transfer. The negotiations that preceded had nothing to do with this at all.

Mr. Roden: He testified to negotiations between he and Mr. Rutherford. I want to ask how well and how much informed he was about existing conditions.

The Court: You think it is material?

Mr. Roden: Yes.

The Court: Objection overruled.

(Testimony of Eugene S. Hawkins.)

Q. Did you at that time commence negotiations with Mr. Rutherford? A. Yes.

Q. He was practically the sole owner of the Juneau Lumber Mills Company? A. Yes.

Q. And also of the yard at Anchorage? [127]

A. Yes.

Q. And of what is known as the Independent Lumber Company in Fairbanks—he and Roy Ferguson were owners of the Independent Lumber Mill in Fairbanks? A. Yes.

Q. How much time did you spend on the premises when you came up and to the time the negotiations were consummated in the agreement? I believe it is identified here as Exhibit No. 1.

A. I made a survey of the mill two different times, one time when it was running and one time when it was closed, taking about two days each time. The balance of my time was spent in the office of the Juneau Lumber Mills and Mr. Rutherford.

Q. Roughly speaking, how much time did you put in when you came first and the time the agreement was consummated?

A. Probably about a total of two weeks.

Q. And of course you spent most of the time down on the premises of the Juneau Lumber Mills?

A. In the office; yes.

Q. This agreement which is the agreement between the Juneau Lumber Mills and your Company was consummated on the last of April, 1947?

(Testimony of Eugene S. Hawkins.)

A. Yes.

Q. And in this agreement Mr. Banfield called your attention [128] particularly to the last paragraph which says: "It is expressly understood that first party," that is the Juneau Lumber Mills, "is not assigning to second party and second party is not accepting or assuming any collective bargaining or labor agreements which may exist between first party and its employees except with respect to the return transportation fare above noted, and that second party does not assume and shall not be responsible for any claims or demands for wages——." The purpose of that last paragraph was that you would not take over any agreements, which at that time existed or might have existed or may have existed, by the Juneau Lumber Mills for the Juneau Spruce Corporation?

A. Yes.

Q. This was the last day of April, 1947, wasn't it?

A. Yes.

Q. And at that time what was known as the Wagner Act was in full force and effect, wasn't it?

A. Yes.

Q. You knew that?

A. Yes.

Q. And it continued in effect until the 23rd of June, 1947, didn't it?

A. Yes.

Q. When the agreement was made, you knew the conditions so [129] far as operating the saw-mill was concerned and loading lumber was concerned; isn't that right?

(Testimony of Eugene S. Hawkins.)

A. There was no loading of any lumber that I ever seen by Mr. Rutherford.

Q. But at that time you knew that the sawmill workers were running the sawmill, didn't you—operating the sawmill? A. Yes.

Q. And whenever any lumber was to be shipped you knew that agreements existed for the transportation of the lumber, for the loading of the lumber by the Juneau—by Local 16?

Mr. Strayer: If your Honor please, I would like to make an objection. I don't think the practice in effect by the Juneau Lumber Mills, none except the Corporation, are of any materiality in this case.

The Court: I suppose the purpose is that he knew what the previously existing arrangement was. Is that the purpose?

Mr. Roden: That is the purpose; yes, your Honor.

The Court: Objection overruled.

A. I would say that I didn't know all of them. I didn't know Mr. Rutherford's business that well, but I did see, when I was up here in July, a commercial steamship being loaded and was told that lumber was going to Anchorage and Fairbanks collectively.

Q. After you became Manager, right when the agreement was [130] signed, or right after, a notice was posted, you stated, in which the Juneau Lumber Mills told the employees that it had dis-

(Testimony of Eugene S. Hawkins.)

posed of its assets down there and that the mill would be shut down for one day and that the men might make application to be employed immediately thereafter; that is right?

A. That is right.

Q. You didn't give any notice to the longshoremen? A. No.

Q. And was it on the 2nd of May when you commenced active operations on behalf of the Juneau Spruce Corporation?

A. I would have to qualify that. I don't recall as to whether it was the first or second day of May.

Q. We can agree on this—there was one day of suspension of operations down there? A. Yes.

Q. And during that day I presume the men came and signed on? A. Yes.

Q. And you re-employed all the men that Roy Rutherford had employed?

A. Yes; and some more.

Q. And they got the same compensation from you as they had received for doing the work for Rutherford? A. Yes.

Q. And the same kind of work was required by the different [131] individuals when they started operating and working for you as they had for Roy Rutherford?

A. Not without exception.

Q. Let us say, generally speaking; that is right?

A. I would say generally, yes.

Q. And the sawmill's business was carried on

(Testimony of Eugene S. Hawkins.)

about the same way as it had been carried on during the Rutherford administration; isn't that right?

A. I don't associate exactly what you have in mind. I had a definite plan for the improvement and more efficient operation which I started on the first day that we took over.

Q. I mean, the general work of cutting lumber?

A. We manufactured lumber.

Q. Substantially the same as he did?

A. Yes—or any other lumber mill.

Q. If there was any lumber sold, it was in the same way as when Rutherford was running the plant; isn't that right?

A. I don't know that to be a fact.

Q. You started delivering lumber to the Engineers' Dock by your carrier; isn't that right?

A. Yes.

Q. And Roy Rutherford had done that before?

A. Yes.

Q. And if a cannery tender pulled in there and loaded lumber, it was the same as on a cannery tender while Roy Rutherford [132] was operating?

A. I couldn't say as to that.

Q. How did you get rid of your lumber which was not sold to the Engineers?

A. I explained that yesterday, the method we used in disposing of lumber to cannery tenders and others, in all phases. I don't know how Rutherford did it.

Q. Let's say, when an Alaska Steamship steamer

(Testimony of Eugene S. Hawkins.)

pulled in to take lumber to your yard in Anchorage or Fairbanks, it was loaded by the members of Local 16, wasn't it? A. Yes.

Q. The same as it had been loaded by members of Local 16 while Roy Rutherford was running the plant? A. Yes.

Q. And if a cannery tender pulled in and wanted lumber, it was loaded on the boat by members of Local 16, wasn't it?

A. No, I wouldn't say——

Q. Who loaded it then?

A. Immediately upon taking over, our insurance companies—I had a conference with them before coming up here about safety features and so on, and we drew up a conclusion of practices that would be the best under that system, and that was that—one of them was that all of our employees should work on our equipment and shouldn't work on any other's equipment. [133]

Q. That was carried out? A. Yes.

Q. So, when your equipment was used, your employees were handling the lumber? A. Yes.

Q. And if anybody else's equipment was used, the longshoremen handled the lumber; is that right?

A. I would say that would be materially right.

Q. What do you mean by "materially"?

A. I don't know of any other instances where any other equipment handled lumber other than the steamship company, and what the steamship company did with the longshoremen was their——

(Testimony of Eugene S. Hawkins.)

Q. How about when a cannery tender pulled in there and wanted a couple thousand boxes and had no means, did they use your equipment?

A. We sold the boxes to the cannery tender and loaded them on their cannery tender.

Q. They used their own equipment?

A. No. We run our own equipment and used our own equipment.

Q. But you landed it on the cannery tender?

A. Yes.

Q. The same as Roy Rutherford?

A. I don't know how——

Q. Do you know how he did it? [134]

A. No, I don't know.

Q. How could he have possibly done it?

Mr. Strayer: I don't think that is proper.

The Court: It is cross-examination.

Q. You used the same crane that Roy Rutherford had used?

A. Yes—cranes, two of them.

Q. Rutherford had used those cranes to load lumber?

A. I never saw Rutherford——

Q. Was there any reason to use them if not for the purpose of loading and unloading?

A. Yes.

Q. What for?

A. To stack for storage and for moving of timbers. One particularly was used for moving timbers from the green chain and had wheels so it could move up and down for stacking of lumber.

(Testimony of Eugene S. Hawkins.)

Q. How do you think he loaded lumber on scows? A. How do I think?

Q. Yes.

A. I imagine he used his own crane.

Q. In other words, as far as appearances were concerned, there was no difference between them while Rutherford was operating or when you were operating; isn't that right?

Mr. Strayer: The witness has already said he didn't know, your Honor. [135]

Mr. Roden: Let him say it again.

The Court: He has already said it.

A. I don't like to assume things I don't know about.

Q. But you can't tell us now of any difference, can you? A. No.

Q. And the longshoremen would come down there when any loading was to be done after the 30th of April, 1947, the same as they had done before April 30, 1947; isn't that true?

A. I don't know what they done before that.

Q. As far as you know, there was no difference; is that right?

A. That is right. I don't know anything about the previous operation.

Q. And this went on until late in the fall of 1947; is that correct? A. Yes.

Q. And it was in the fall of 1947 when we heard the first rumblings about difficulties springing up; isn't that right—between the longshoremen on the

(Testimony of Eugene S. Hawkins.)

one hand and your company on the other hand?

A. I don't know when you heard about anything.

Q. When did you hear; tell us when you heard about it?

A. In July was my first contact.

Q. There wasn't anything serious at that time, was there?

A. I don't know what would be determined "serious."

Q. You know what "serious" means? You are a businessman, [136] aren't you?

A. Surely.

Q. Well—serious trouble.

A. There was no threat of a picket line. Their request was for work the same as before.

Q. That wasn't anything much out of the way?

A. What?

Q. For the longshoremen to come and talk to you when they saw what was going on? Put it this way—the first time any difficulties arose was when you started to load the first barge?

A. No.

Q. I am talking about serious difficulties.

A. The seriousness of it then was no different than it was in July. There was just a request for work both times.

Q. And you told them you couldn't give them the work?

A. Yes.

Q. At this time or by this time you had been negotiating a contract with the I.W.A.; isn't that right?

A. Yes.

(Testimony of Eugene S. Hawkins.)

Q. Now, before we go any further let's tell the jury what I.W.A. really means. You and I know, but maybe some people here are not as well advised.

A. You would like to have me tell what the I.W.A. is?

Q. Yes—what the letters stand for, mainly so the jury will [137] know.

A. I.W.A. is International Woodworkers of America which is a subsidiary of the C.I.O. Saw-mill & Woodworkers Union.

Q. And their Local was M-271?

A. M-271; yes.

Q. And what are the letters for the longshoremen? A. I.L.W.U.

Q. Which means?

A. International Longshoremen & Warehousemen's Union.

Q. And their Local was No. 16? A. Yes.

Q. In the meantime now—I am now talking about the summer of 1947—you were negotiating a contract with the I.W.A.—that is, the International Woodworkers of America? A. Yes.

Q. And you had a number of meetings with representatives of that Local? A. Yes.

Q. And the thing was discussed many times; that is right, isn't it?

A. The contract was discussed.

Q. As to what would go into it and this and that?

A. Well, the provisions of the contract were changed and made agreeable by both parties.

(Testimony of Eugene S. Hawkins.)

Q. In the meantime you were running under the contract which [138] the I.W.A. had with the Juneau Lumber Mills; isn't that right?

A. No.

Q. What contract were you running under; what understanding were you operating under?

A. We had an understanding to pay the same wages as Rutherford and work the same hours as he was, and other working conditions would be talked over embodied in the new contract as time went on and we could possibly get together and negotiate it.

Q. At that time you were familiar with the contract entered into between Local 271, the Woodworkers, and the Juneau Lumber Mills?

A. I had seen the contract.

Q. When you finally prepared your contract which was signed November 3, 1947, you copied a good portion of the Rutherford contract into your contract; isn't that right?

A. No.

Q. None of it?

A. I didn't copy any of it; no.

Q. Who prepared the written contract there?

A. Mr. Card of the Coos Bay Lumber Company prepared that contract.

Q. Now, in that contract there is a provision which says, designated here as the "Union Recognition": "The Union is [139] hereby recognized as the sole and exclusive collective bargaining agent for all the employees of the Employer," that is you, "in its sawmill, manufacturing and retail

(Testimony of Eugene S. Hawkins.)

departments at Juneau, Alaska,"—and then you excluded the superintendents, foremen and so forth. If this was to cover all the employees of the employer, why did you mention that it covered the employees engaged in its sawmill, in its manufacturing plant, and in its retail departments?

A. Well, the retail department is a department by itself, although it is located on the premises. It is run separate of the sawmill operation entirely. The I.W.A. wanted to include that in their agreement to bargain for that one. And manufacturing just covers everything, every phase of manufacturing, and that is why it was worded in that way, and that is a standard wording for all the contracts that I have ever negotiated or been a party of. It is just a phraseology that is accepted by the lumber industry.

Q. And that is exactly the phraseology which was used in the Juneau Lumber Mills' agreement with the same Union; isn't that true?

A. I wouldn't know that, but I would think probably it would because it is a standard phraseology.

Q. All right. Now, Rutherford had three departments down there the same as you did? [140]

A. No.

Q. A sawmill? A. Yes.

Q. And he had a planing and manufacturing department, didn't he? A. Yes.

Q. And he had a retail yard, didn't he?

(Testimony of Eugene S. Hawkins.)

A. Yes.

Q. And he sold out that retail yard substantially what you have—lumber, plasterboard; you sell cement, and you sell this and sell that; isn't that true?

A. Yes.

Q. In other words, you carried on the same as Rutherford did in that respect; isn't that true?

A. No. Rutherford didn't make any distinction or separation of the retail plant from the rest of the plant.

Q. He did with M-271, didn't he?

A. I don't know.

Q. You said he had in his contract?

A. No; I don't know.

Q. You have seen the contract?

A. Yes. I didn't know that provision was in there; it could or couldn't be.

Q. You know now it was in there?

A. No. If I could see it— [141]

Q. Have you a copy of the Rutherford contract?

A. No.

Mr. Roden: Have you got one?

Mr. Banfield: No. We don't operate under that.

Mr. Roden: All right. We will try to produce one.

Q. In all your negotiations with the Longshoremen's Union you gave them the answer that you could not consider their application for employment because you had assigned that particular work to somebody else; isn't that right?

(Testimony of Eugene S. Hawkins.)

A. That isn't the wording that I used.

Q. Well, substantially, it is the summation of what you told them, isn't it?

A. That we had recognized the I.W.A. as the exclusive bargaining agent for our employees and that was the reason we couldn't bargain with them.

Q. That was the sole reason? A. Yes.

Q. None other? A. No.

Q. Now, things kept on running along until the spring of 1948; is that right? A. Yes.

Q. After the winter shutdown you made preparations to start up for the 1948 season?

A. Yes. [142]

Q. And shortly, about the time that the season opened, you were again approached by members of Local 16, and they asked you if you would turn over to them the loading of your barges and other water-borne transportation means, and you had a number of meetings there, and no agreement was reached, and, as you said a moment ago, the reason why you could not see your way clear to do business with Local 16 was because this particular kind of work had been assigned by you to Local 271; isn't that right? A. Yes.

Q. Later on you had a number of meetings with representatives of Local 271 and Local 16 in which Local 271 asked you to turn that work over, namely the loading of the lumber, to Local 16; isn't that true? A. Yes.

Q. And you still said that you couldn't do so

(Testimony of Eugene S. Hawkins.)

because you had assigned that work to Local 271 which was now asking you to turn the work over to Local 16. Is that the position you took then?

A. Yes.

Q. At this time if your sole reason for not assigning this work to Local 16 was because you had turned it over to 271 and 271 asked you to turn it over to 16, your contention was no longer tenable; isn't that true?

A. Yes—that wasn't the sole and only reason that developed. [143]

Q. You found another reason?

A. Another reason had been developed by that time.

Q. You never mentioned that reason either to representatives of 271 or of 16, did you?

A. I don't recall any specific instance; no.

Mr. Roden: I think that is all as far as Local 16 is concerned.

Mr. Andersen: Just a moment, your Honor. Just a few questions, your Honor.

Q. (By Mr. Andersen): Mr. Hawkins, with respect to this contract of November 3rd—I believe that is Exhibit No. 2—when did you say you entered into that agreement and signed it?

A. I didn't understand that.

Q. With respect to the Company and the I.W.A., when did you say you entered into and signed that contract; what was the date?

A. It was signed November 3rd.

(Testimony of Eugene S. Hawkins.)

Q. Prior to November 3rd there was never any actual agreement between the parties about that contract? A. Yes.

Q. As to all terms? A. Yes.

Q. As to all terms? Is that true?

A. Yes. [144]

Q. Now, this exhibit here—didn't you receive word from Mr. Schmidt on October 18th that the Union turned down the proposed contract?

Mr. Strayer: The letter?

Mr. Andersen: I am not referring to a letter. I am asking if he didn't receive word.

Mr. Strayer: I think the witness has a right to see the letter.

Mr. Andersen: I am not referring to anything. I am just referring to word he received.

The Court: The rule here is that before a witness is examined on anything in writing, the writing must be shown him. I don't see that this is—

Q. Didn't you receive word from Mr. Schmidt on October 18th that the contract had been turned down? A. I don't recall it.

Q. Did you or did you not receive any such word? A. I don't know.

Q. Is it your testimony here that prior to October 18th you and this Union had agreed, not disagreed, on the terms of this contract?

A. No.

Q. You hadn't agreed to it on October 18th?

A. I don't know the exact date we agreed, but it was prior to November 3rd. [145]

(Testimony of Eugene S. Hawkins.)

Q. What happened was that on November 3rd, or maybe a day before, you finally came to an agreement on the terms of the contract and on November 3rd signed it; isn't that true?

A. No.

Q. Did you have a contract, rather than an agreement, between you in effect before—on October 1st?

A. We finally came to an agreement on this—all the provisions of the contract. I had business I had to attend to and had to leave. Mr. Card was left with authority to sign the contract, and I don't know the specific day that this agreement amongst all parties was consummated.

Q. When did you leave?

A. I don't know what specific day I went.

Q. What month? A. October.

Q. The first part or latter part?

A. I was gone on November 3rd.

Q. You weren't here on November 3rd?

A. No.

Q. Did you leave in November or did you leave in October?

A. I would say that I left in October.

Q. The first part or last part?

A. I would say the last part.

Q. About how last? [146]

A. It was after Mr. Card's and my arrival back here from the States on the 23rd of October.

Q. You were here the 23rd of October?

(Testimony of Eugene S. Hawkins.)

A. Yes.

Q. And left Mr. Card here to finish the negotiation of the contract, didn't you? A. No.

Q. As a matter of fact didn't you tell him that is what you paid him for—negotiating this contract and seeing that it was negotiated?

A. Yes; but I didn't leave him here. I was here while the final negotiations were taking place.

Q. I assume you left sometime after October 23rd; is that correct? A. Yes.

Q. So, at the time that you left the contract hadn't been signed, had it?

A. No, it hadn't.

Q. And you have no further knowledge of your own so far as those facts are concerned—that is, so far as the negotiating of the contract is concerned? A. It was completed when I left.

Q. That is, you had come into general agreement about certain things; isn't that true—regarding the hours and working conditions and wages to be paid? [147]

A. We came to a general agreement on all the provisions of the contract.

Q. Had you drafted it at that time?

A. Yes.

Q. Was the contract in completed form on that day?

A. I wouldn't definitely say it was typed. It was in completed form.

Q. All you are saying is that you had talked

(Testimony of Eugene S. Hawkins.)

over the terms and conditions of employment, and nothing was drafted?

A. Before I left—I stayed specifically so to be sure I knew all the things that were agreed on by everyone before I left, and it was being drafted. I don't know if it was written on any paper or what. I don't think it was completely typed up in contract form at that time, though it may have been.

Q. As a matter of fact nothing was typed up, was it? A. Yes.

Q. Can you tell me how much of it was typed?

A. No.

Q. As a matter of fact what you were doing was simply looking at the old I.W.A. contract between the I.W.A. here and the Juneau Lumber, wasn't it— A. No.

Q. And discussed those terms and conditions?

A. No. [148]

Q. In any event you were trying to come into general agreement and when it was executed it would be the contract between you? A. No.

Q. Tell me what is wrong about what I have said.

A. In the first place, during the month of June, I believe, or the last part of May possibly, I drafted a contract myself and with all the provisions I thought were fair to both parties, and all the things were in it, and I submitted it to the I.W.A. officers, and they went over it and found provisions they

(Testimony of Eugene S. Hawkins.)

didn't like and thought there should be some changes in it and brought it back.

Q. From that time on you both started, back and forth, and you would agree on something, and there would be a change agreed to on something else, and that continued all the way up until the contract was signed; isn't that true?

A. It continued all the way up to sometime in the last part of October.

Q. Were you here in May and June of 1947?

A. I wouldn't say I was here all the time.

Q. As a matter of fact you spent most of your time away from the mill?

A. I think I probably spent 50 per cent of the time away.

Q. Consecutively, or staggered months or staggered weeks?

A. There was no schedule for it at all. We were just getting [149] the company in operation and there was more or less activity in all branches. I left for various places upon the need for it, so sometimes I was only here a day or two and gone a week, sometimes a month and gone a week. There was no rhyme or reason as to the times for leaving and being here.

Q. And during your absence Mr. Schmidt was in charge; isn't that true? A. Yes.

Q. And stationed here continually with the title of Assistant Manager; isn't that true?

A. That is right.

(Testimony of Eugene S. Hawkins.)

Q. Are you still an employee of the Company?

A. No.

Q. You left the employ of the Company then June 10th of last year?

A. No. August 15th of last year.

Q. August 15th you left the employ of the Company; you still occupy the position of Director of the Company but are not employed by the Company?

A. That is right.

Q. Do you know if this contract was signed—that is, Exhibit 2—do you know if it was signed at Juneau, or where was it signed?

A. It was signed at Juneau, Alaska. [150]

Q. Do you know if the contract has been kept here all the time or in the head office in Portland, which, I understand, is the head office of the Company?

A. Here all the time.

Q. Did you send a copy of it to Portland?

A. There were numerous copies made of it.

Q. Did you send the contract to Portland with a letter accompanying the contract?

A. I don't recall the specific time of doing it. I did send a copy of the contract to Mr. Card in Coos Bay prior to the signing. Mr. Card may or may not have taken it back for distribution——

Q. Mr. Card was an employee of Juneau Spruce Corporation?

A. Not an employee in that sense.

Q. An agent of the Company, working for the Company during this period of time?

(Testimony of Eugene S. Hawkins.)

A. Yes.

Q. In the Portland office did you see any correspondence regarding this contract after it was signed?

A. My activities in Portland was as a Director, and I never got into any phase of the contract or anything or the files to know whether it was there or to have seen it.

Q. As a matter of fact—when did you return to Juneau after you left in the latter part of October; when did you return? [151]

A. I don't recall the exact time I returned.

Q. Do you recall where you went?

A. I don't know now; I think to the logging camp.

Q. You didn't go to Portland?

A. I am almost sure I didn't.

Q. Do you know when you returned to Juneau?

A. No, I don't know when I returned to Juneau.

Q. Was it very long after November 3rd?

A. No.

Q. When you got back, didn't you take a copy of this contract and send it to Portland for the official files of the Company, advising them it was entered into?

A. I am almost positive that would have been Mr. Card's duties to see that anyone else in the Company would have it.

Q. Didn't you tell Mr. Card when he signed it

(Testimony of Eugene S. Hawkins.)

to send it to the officers of the Company for their records? A. No.

Q. Or did you understand he would naturally do such a thing?

A. It never entered my mind. This is the main office.

Q. Is this? I thought it was Portland from what you said.

A. There is a Portland office, but everything is done in this office.

Q. Is that where the President maintains his office? A. Yes. [152]

Q. You maintain your office of Vice President down there? A. Not in Portland.

Q. And the corporate offices are in Portland and the operational offices are in Juneau; is that what you mean to say? A. Yes.

Q. By the way, I understand from this contract that \$595,000, roughly, was paid for what you bought from the Juneau Lumber; is that true?

A. That was for physical assets.

Q. I say, for what you bought from the Juneau Lumber, you paid \$595,000?

A. With the inventories of logs, supplies and other things it would come to a bigger figure than that.

Q. How much of the physical assets, what percentage of the physical assets were located here in Juneau?

A. I don't know how to break this down.

(Testimony of Eugene S. Hawkins.)

Q. Just approximately?

A. I don't know how to give an approximate. We have a mill and retail yard in Fairbanks——

Q. You said you made a survey. If you made a survey, you must have broken it down into valuations. If there were twenty properties, it is certain every property must have had a valuation.

Mr. Banfield: When counsel started out, he said he was going to ask questions preliminary——

Mr. Andersen: I didn't make such a statement.

Mr. Banfield: All the questions about the Portland office or conversations where assets were split up has nothing here to do with the issues of this case, the right of this Company to assign work to whomsoever it pleases, and I object to it as irrelevant, and it is tiring everybody out and burdening the record.

Mr. Andersen: When the contract was introduced in evidence, I objected to its introduction as completely immaterial, among other objections. Over my objection the Court permitted it to go into evidence. If I understand the time-honored scope of cross-examination, I may examine on anything introduced. I think that is correct. He introduced it in evidence. I want to examine the witness on it.

The Court: That is, generally speaking that is true, but it seems to me that it is always subject to the condition that it be relevant or material. If you want to examine him as to the events leading up to making the contract, as you have, and what actually

(Testimony of Eugene S. Hawkins.)

occurred at the time of its execution, that is proper cross-examination. But what do you claim, so far as materiality is concerned, for a break down of the purchase price into percentages?

Mr. Andersen: I think, if the Court will permit me a few questions, I think the Court will see the development.

The Court: The Court will permit you to proceed. [154]

(Whereupon, the Court recessed until 2:00 o'clock p.m., May 2, 1949, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the witness Eugene S. Hawkins resumed the witness stand and the cross-examination by Mr. Andersen was continued as follows:)

Q. What value did you place upon the property of the Company here in Juneau?

A. There never was any break down of this operation prior to the Juneau Spruce purchase.

Q. In other words, you simply considered the whole thing as one lump parcel? A. Yes.

Q. So far as you personally are concerned when making the valuation, didn't you go from property to property and place a value on each separate property?

A. No, I wouldn't say that I did.

Q. Then how did you arrive at the sum of \$595,000.00—simply by looking at the whole thing and placing a value on it?

(Testimony of Eugene S. Hawkins.)

A. Yes. The possibility of its earnings had a bearing on the value of it.

Q. Naturally.

A. And the outlets it had through the retail yards in Anchorage and Fairbanks and——

Q. That was the good will side of the business?

A. Yes. [155]

Q. But of course you didn't pay the good will part of the business; you simply bought the physical assets? A. That is right.

Q. So the possibilities of profit were not considered in the purchase price then, were they?

A. In the light of the thought of whether or not it was worth that much, we never did go into an actual appraisal of the thing.

Q. How many properties were there altogether?

A. A retail yard, buildings and installation in Anchorage, a sawmill and retail yard and buildings in Fairbanks, a logging camp and equipment in Sea Otter Sound, and this sawmill here, boats, and——

Q. Trucks? A. Carriers; no trucks.

Q. I understand your testimony is that in trying to arrive at the sum of \$595,000.00 you didn't break them down to determine the valuation of each property and then add them up to come to \$595,000.00? A. We didn't do that.

Q. Did you inquire, Mr. Hawkins, as to the total amount of wages paid longshoremen during the preceding year from the date your corporation purchased the plant? A. No.

(Testimony of Eugene S. Hawkins.)

Q. Did you inquire as to the total amount of money paid to [156] longshoremen by the plant and charged to customers and the work done by longshoremen and absorbed by the corporation?

A. I never went into the Juneau Lumber Mills costs or amounts of money taken in or disbursed.

Q. At the time of the conference with representatives of Local 16, did you compile any figures to show the total amount of expense chargeable to the Juneau Spruce Corporation directly—that is, if you gave them the work that the I.W.A. said they were willing to give them?

A. The I.W.A. didn't say they were willing to give them any work at this meeting.

Q. Whenever the time was, did you at that time make a computation of the total amount of money you would pay for this barge work—that is, all this work from the rail out? A. I believe I did.

Q. What was the total computation of wages you would pay, chargeable to your Company?

Mr. Strayer: I don't see where it is material. I suppose counsel is trying to get at whether it is a small or large amount of money. I don't see its materiality. Mr. Hawkins took the position the contract entitled him to. I object on that ground.

Mr. Andersen: Does the Court want argument on that?

The Court: You may state your views. [157]

Mr. Andersen: There is that reason and also more reasons. The Taft-Hartley law has a pre-

(Testimony of Eugene S. Hawkins.)

amble. This part of the Act states that one of the purposes, and probably the main purpose for its passage, is to have industrial tranquility and that management and labor get together and iron out their differences. At the appropriate time—may it please the Court, if a corporation or a company unreasonably refuses to enter into labor relations with any group or any union, particularly when at the core there are no jurisdictional issues involved—we will take the position at the appropriate time that it is contrary to public policy and they can't violate the spirit of the act, as he admitted has been done, and then secure damages for \$1,000,000.00 for a minimum amount of expense to the company. Here is a corporation that paid \$595,000.00, eventually to make \$1,000,000.00 in the next eight months for net profit, and then refuses to enter into labor relations.

The Court: That is more of an argument—and counsel should refrain from arguing matters of that kind.

Q. Will you give me the figures please?

A. I have no way of giving you the figures. It was just solely on my behalf to see what moneys was involved. I don't recall what the figures was nor recall the number of employees involved.

Q. It wouldn't have amounted to 2 per cent of your pay roll, would it? [158]

A. I don't have the personal knowledge to say that or anywhere close to it.

(Testimony of Eugene S. Hawkins.)

Q. You are Vice President? A. Yes.

Q. You ran the mill and were Manager for some little time? A. Yes.

Q. During the time you were there and actually managed—how long were you there, from May 1st to August 15th? A. Yes.

Q. What was the approximate longshore pay roll directly chargeable to and absorbed by the Juneau Spruce Corporation—I don't want dollars and cents; just approximately?

Mr. Strayer: Will you specify whether it was work by the longshoremen or longshore work performed by the sawmill employees?

The Court: Yes.

Mr. Andersen: I intended to ask that secondly.

Q. First, by longshoremen?

A. I just couldn't answer that.

Q. A very small amount, wouldn't it be?

A. As a comparison to the purchase price of the mill, using that as a comparison?

Q. No. As a comparison to the usual pay roll of the Company.

A. I would say very small as compared to the usual pay roll of the Company. [159]

Q. Less than 2 per cent? Less than 1 per cent?

A. I have no way of saying; but a very small amount.

Q. During the same period of time, tell me the amount of pay roll paid to the men who took care of loading cargo and the pay roll paid to and ab-

(Testimony of Eugene S. Hawkins.)

sorbed by the Juneau Spruce Corporation from the rail out, the same work the longshoremen came to you and said they wanted to do with I.W.A. consent from the bull rail out; what was the total amount?

A. That was done in conjunction with our yard work. Our yard employees did it. It was all intermingled with it. There was no break down of a specific job—loading scows, stacking or unstacking lumber. It was all made up in a day's work for them.

Q. During the period from the time you took over until you left there in August, how many barges did the Company operate?

A. Well, at one time—or do you mean the total number of barge shipments made?

Q. No. The total number of barges you operated, not the shipments made; the total number of barges you operated?

A. We started out with one barge and added another, then two more and took one off.

Q. An average of two?

A. I would say an average of three.

Q. And how long would they be at the plant; how long to load [160] and unload and make trips?

A. From one week or less. The barge was used in supplement to our storage area. We didn't load it—we loaded as lots were completed.

Q. In other words, would a total of two men be assigned to work on those barges steadily? Would it amount to that much?

(Testimony of Eugene S. Hawkins.)

A. I don't have any way of knowing that.

Q. How long have you been in the lumber business?
A. Since I was born.

Q. How old are you?
A. Thirty-seven.

Q. All your life?
A. All my life.

Q. How many men would you say normally would be assigned to work on those barges steadily?

A. When we actually were loading lots on the barges, we had one man attending the slings on the barge and sometimes two, and one man operating the crane, and one man attaching the slings on the dock; and when this particular lot was put on there, they did what else there was in the yard—stacking in the yard or unstacking—until one or more lots were completed to go on the barge. When we were in the actual process of putting lots on the barge, a total of four men were used. [161]

Q. It wouldn't average out to the total of two men per week, would it?

A. I can't see how I could answer that.

Q. You mean you can't answer that?

A. What it would average out—it takes four men to do the job, not less than three.

Q. Granted. But they didn't work full time, did they?
A. No.

Q. During the period from May to August, would it average out as much as the full time of two men a week?

A. Steadily employed? Two men a week?

Q. Would it average that?

(Testimony of Eugene S. Hawkins.)

A. I don't know how I could use a basis of thought to arrive at that figure.

Q. If you have five men working on the job, how long would it take to load or unload a barge?

The Court: It seems to me you spoke of two things both of which differ—one, loading a barge for storage; and one, for shipment. One might be slow and the other leisurely.

Mr. Andersen: I will split it up as your Honor suggests.

Q. Assuming you are loading for shipment, how long would it take five men to load the barge for shipment?

A. That would depend on the particular orders. We cut on orders. Everything that went on the barge was a definite [162] customer's order.

Q. You certainly never used more than five men loading barges?

A. Yes, I think there was a time when we had more than five men. We loaded one barge particularly and we finished the loading with two shifts, so on that particular barge there were more than five.

Q. It wouldn't average more than five on any one barge at any one time; that was an exceptional circumstance—normally five?

A. You quoted a figure of five. Four is nearer, normally four. Sometimes they would work half a day, sometimes two hours, sometimes all day. It would just depend on the logs we were sawing and

(Testimony of Eugene S. Hawkins.)

the filling of customer's orders, how it developed.

Q. Then four of your men were assigned to this particular type of work and, if I understand your testimony correctly, they worked when they were required to work on these barges but they never worked full time in performing work on the barges?

A. There never was four men assigned to work on the barges. They were picked arbitrarily.

Q. All right. Four men were picked arbitrarily to work on the barges, but they never did work full time? A. No. [163]

Q. Is the same statement substantially true regarding the storage of lumber on barges, as his Honor indicated? A. Yes.

Q. Four men part time? A. Yes.

Q. What is the total number of employees of the Juneau Spruce Corporation?

A. We had a maximum of 211, I believe.

Q. That is here, is it, at Juneau?

A. Yes, I believe that is right.

Q. How many loggers do you employ?

A. About fifty.

Q. And how many at these other plants that you employ?

A. It varies from three to ten depending on when we get a shipment in. While we have available to store lumber in our yards—the permanent employees would be three or four.

Q. Would the three to ten include the office force? A. Yes.

Q. Everybody? A. Yes.

(Testimony of Eugene S. Hawkins.)

Q. 275 employees altogether. Would that be about correct?

A. I would say that would be; yes.

Q. In respect to the picket line that you mentioned, and you said there were four pickets there?

A. To start with; yes. [164]

Q. How long were four there?

A. I don't recall the exact number of days. It wasn't very long.

Q. A few days? A. Yes.

Q. How many thereafter? Two? A. Yes.

Q. I understand your plant faces on the main street of this city? A. Yes.

Q. And also faces the water front?

A. Yes.

Q. And has at least three entrances; is that correct?

A. You can enter the plant at a dozen different places.

Q. And that is along the 1100 feet you mentioned? A. Yes.

Q. Was that 1100 feet along the water front and the main street of the town? A. Yes.

Q. And you can enter the plant at a dozen places? A. Yes.

Q. The pickets, after the four, remained in front of the main gate; is that correct?

A. In front of where our time clock was.

Q. Would that be considered the main gate?

A. That would be considered the main gate; yes.

(Testimony of Eugene S. Hawkins.)

Q. Is that where they are now? A. Yes.

Mr. Andersen: I think that is all.

Redirect Examination

By Mr. Banfield:

Q. Mr. Hawkins, after these pickets were established, who came to work?

A. After the pickets were established on the 10th of April, our foremen and supervisor employees.

Q. Did any of the mill hands come to work?

A. Yes, some of the mill hands came to work.

Q. How many?

A. I think about possibly eight or ten.

Q. And did they go through the picket line?

A. Yes.

Q. Were they enough to carry on any operation in the mill? A. No.

Q. Did the mill operate thereafter while you were manager up to June 1, 1948? A. No.

Q. Was there any work performed?

A. Yes.

Q. What did it consist of? [166]

A. There was some lumber in the process of being processed at that time, and our retail yards were in need of flooring, and there were a few special items we had in our kiln, and these fellows manufactured that lumber into these specialty items preparatory to shipping them.

Q. After that work was completed what happened?

(Testimony of Eugene S. Hawkins.)

A. The only thing that was done was just maintenance and the likes of that at the plant.

Q. Now, Mr. Hawkins, when Mr. Andersen, counsel for the defendant I.L.W.U., was questioning you, he asked you as to the amount of funds that were paid longshoremen and absorbed by the Juneau Spruce Corporation, and you told him that, I believe, you didn't know how much it was?

A. Yes.

Q. Now, what is your understanding of what he meant by funds paid and absorbed by the Juneau Spruce Corporation?

A. Well, the only monies that was paid longshoremen that was absorbed by the Juneau Spruce Corporation was the tie-up charges. I don't know whether there was one vessel or two that moved up to our dock, and I assume that is what he had reference to.

Q. What would those tie-up charges amount to for each boat?

A. It is a small amount. I don't know how much it would amount to.

Q. Approximately? [167]

A. Ten, maybe fifteen or twenty dollars; I don't know.

Q. When was the first time the I.W.A. consented to this barge loading work being turned over to the I.L.W.U.?

A. In the early days of April, 1947—or eight, I mean.

(Testimony of Eugene S. Hawkins.)

Q. 1948? A. Yes.

Q. Was that at a meeting at the mill?

A. Yes.

Q. Was that the meeting you referred to as happening just before the picket line went on?

A. Yes.

Q. Where the I.W.A. and longshoremen and the Company all had representatives present?

A. Yes.

Q. Was that the first time the I.W.A. consented to this work being assigned to the longshoremen?

A. Yes.

Mr. Andersen: You mean, within the knowledge of the witness?

Q. Yes. Within your knowledge?

A. Yes.

Q. Did the Company consent that this work be done by the longshoremen? A. No.

Q. Did the Company insist that it be done by the I.W.A.? [168] A. Yes.

Q. Were you the one that made that decision to insist on that? A. Yes.

Q. And what were your reasons for so insisting?

Mr. Andersen: I object; it is incompetent, irrelevant and immaterial, may it please the Court.

The Court: Objection overruled.

A. Well, we had recognized the I.W.A. as the exclusive bargaining agent, and they had formally signed the contract, and it was agreed that was included in their scope and in their work.

(Testimony of Eugene S. Hawkins.)

Q. How long had the contract been in effect?

Mr. Andersen: The contract is the best evidence, may it please the Court.

The Court: Yes. It is already in evidence.

A. Am I to answer that question?

The Court: No.

Mr. Banfield: I will withdraw the question.

Q. Were there any other reasons?

A. Yes.

Q. What were they?

Mr. Andersen: To which I object on the grounds that it is immaterial and, may it please the Court——

The Court: The same ruling.

Mr. Andersen: Self-serving. [169]

A. Am I to answer?

Q. You may answer.

A. In the first place there were new officers for the I.W.A. that we were talking with, different than when we signed the contract, and these new officers weren't familiar with the interpretations and agreements made on that day and they had—they were under the impression that the contract——

Mr. Andersen: May it please the Court, I am going to object to this witness testifying to what anybody else had an impression of.

The Court: Yes; I think you will be limited to what was said.

Q. What did they say in that respect?

(Testimony of Eugene S. Hawkins.)

Mr. Andersen: To what respect?

Q. What did the I.W.A. say in respect to whatever you were going to talk about now?

Mr. Andersen: I submit that is speculative and conclusory.

The Court: I assume from what has gone on before that the question is directed to the witness' knowledge of what they said as to their understanding of the contract.

Mr. Banfield: That is right, your Honor, and why he refused to release them from the contract.

Mr. Andersen: His understanding of the contract. [170]

The Court: Not his understanding; the understanding they expressed. I think that is it.

Q. Go ahead.

A. They said they had been informed a contract which the longshoremen had with the Juneau Lumber Mills was still in effect for them to do that work. I told them that it wasn't in effect, if they ever had one. And that is the gist of what they said. I went on to tell my other reasons of why we wanted them to do the work.

Q. What were the other reasons?

A. That, if they gave this work of barge loading away so that we would have another union to bargain with, the electricians would demand the same thing, and the plumbers, and the machinists and teamsters, and we would have six or eight unions to deal with, and we desired to deal all with one

(Testimony of Eugene S. Hawkins.)

union; that, plus the fact that we had lived up to our side of the agreement and felt they were morally obligated to live up to their side of the agreement even though they had changed officers which of course didn't know what the other ones had done.

Q. Were there any other reasons why you didn't want to make an agreement with I.L.W.U.?

Mr. Andersen: That is—you are talking about Local 16?

Q. Local 16. [171]

A. Well, that is all I can recall right at this moment.

Q. How did you feel with respect to the value of the contract—I am trying to refresh your memory at this point—the value of the contract with the I.L.W.U.? A. I don't get that.

Mr. Andersen: I don't get that either. Will you please repeat the question, Miss Reporter?

Court Reporter: "How did you feel with respect to the value of the contract—I am trying to refresh your memory at this point—the value of the contract with the I.L.W.U.?"

A. Well, the value of the contract with the I.L.W.U, from all I have seen since I have been in the Territory, would have been of little value. They agree to one thing and change it every little while to add more or——

Mr. Andersen: I move all this be stricken.

Mr Banfield: If the Court please, I will establish the purpose in the next question.

(Testimony of Eugene S. Hawkins.)

The Court: The motion is denied anyhow. You may proceed.

Q. Now, Mr. Hawkins, did your opinion of the value of the contract with the I.L.W.U. influence you in this decision not to let the I.W.A. be released from that part of the contract?

A. It very definitely had a bearing.

Q. Did the previous demands of the longshoremen—requiring [172] other further work than just loading barges—in the previous meetings have any effect upon your decision? A. Yes.

Q. How did that affect it?

A. To go back over them, at first they wanted all the work including carriers and lift trucks, and the work of removing the carrier blocks, and they seemed at every meeting to have a little revision of their demands so it wasn't consistent, and I assumed it would always be that way. That is what I have seen as long as I have been here.

Q. Mr. Hawkins, were these reasons given to the I.W.A.? A. Yes.

Q. At what time?

A. In this—about April—in the early days in April.

Q. At this meeting just before this picket line was established? A. Yes.

Q. Do you remember who it was who mentioned these things to the I.W.A.? A. Yes.

Q. And did that alter their position any?

Mr. Andersen: I am going to object to this line

(Testimony of Eugene S. Hawkins.)

of questioning, may it please the Court. It is strictly immaterial.

The Court: Well, I think it is already apparent [173] that it didn't alter their position.

Q. Who made these statements to the I.W.A. members at the meeting?

Mr. Andersen: To what?

Q. The I.W.A. members.

A. Mr. Banfield.

Mr. Andersen: What was the name?

A. Mr. Banfield.

Q. Was that in the presence of the I.L.W.U. members, or after they left?

A. After the I.L.W.U. members left.

Mr Banfield: That is all.

Recross-Examination

By Mr. Roden:

Q. Mr. Hawkins, the real reason why you didn't want to turn this work over to the longshoremen was that you expected the work to be done cheaper, wasn't it?

A. No. It would have been done cheaper no doubt, but it wasn't any bearing on it.

Q. I understood you to say a moment ago that the electricians would also come and ask for something; is that right?

A. That—and the plumbers and machinists.

Q. You had electricians there already, hadn't you?

A. Yes. [174]

Q. And they didn't ask for anything, did they?

(Testimony of Eugene S. Hawkins.)

A. No.

Q. And you had plumbers there, didn't you?

A. Yes.

Q. They hadn't asked for anything, had they?

A. No.

Q. You say the officers of the I.W.A. had changed between the time that the contract was signed and when you had these talks in April, 1948?

A. Yes.

Q. It wasn't in order to bind the officers that you made a contract, was it?

A. It wasn't what?

Q. You didn't want to bind the officers? In other words, you didn't want to bind Glen Kirkham by the contract made on November 3rd; you wanted to bind the union for the 200 or 250 men working there, didn't you?

A. Yes.

Q. And those 200 men told you and begged you to turn the work over to the longshoremen?

A. I presume it was their representative. The fellows who made the statements said they were representatives.

Q. You know several meetings were held in the early part of April, don't you, by the sawmill workers, the I.W.A.?

A. I don't know how many. [175]

Q. You were told about them?

A. I was told of at least one. I don't know how many more there were.

Q. You know 200 sawmill workers were present

(Testimony of Eugene S. Hawkins.)

who voted on turning the work over to the longshoremen? A. I don't know how they voted.

Q. You weren't told how they voted?

A. I was told they agreed to give the longshoremen their work.

Q. Exactly. You were told that not only once but several times—at least twice; isn't that true?

A. Only once.

Q. Didn't you give them time off from work to attend a meeting at which this very question came up?

A. No; we didn't give them any time off.

Mr. Roden: That is all.

Recross-Examination

By Mr. Andersen:

Q. Just a few questions. Do you know the difference in the wage scale if the longshoremen loaded these barges and the amount of money you paid the men who loaded the barges—the amount per hour?

A. I know there is a difference.

Q. How much, do you know? A. No.

Q. Would it be more or less?

A. The longshoremen get more.

Q. You mentioned another I.L.W.U. contract. To which contract did you refer?

A. The one they referred to. Originally they said that they had——

Q. Could I interrupt? You mean the contract between the Juneau Water-front Employers and

(Testimony of Eugene S. Hawkins.)

the Juneau Lumber Mills? A. Yes.

Q. As I understand you, you had never operated under that contract at all, had you? A. No.

Q. So you had no experience with that contract at all, had you? A. No.

Q. That is the contract to which you referred when Mr. Banfield examined you; is that correct?

A. Yes.

Q. Do you know how long the Juneau Spruce Mills had done business with Local 16 under a collective bargaining contract?

Mr. Strayer: Do you mean Juneau Lumber Mills?

Q. Juneau Lumber Mills. A. No.

Q. Had you made any inquiries? A. No.

Q. You didn't inquire how long the longshoremen had done work for the Juneau Lumber Mills?

A. No.

Q. You had no personal experience with the contract at all? A. No.

Q. I see. Now, you mentioned that the demands of the I.L.W.U. were inconsistent and you thought they might want to organize other portions of your plant; is that what you said?

A. Well, I didn't say organize other portions of our plant, but they were not consistent with their demands and it might carry back in that portion.

Q. Did I understand you said they were wanting more and more work? A. No.

Q. Actually they were asking for less and less?

(Testimony of Eugene S. Hawkins.)

A. Yes.

Q. First they wanted to move the lumber from the last place of rest, from there to the boats or docks? A. Yes.

Q. Then, as I understand it, you said some member of Local 16 said he thought that was unreasonable and they modified their demands and asked you only for typically longshore work from the last place of rest or bull rail to the boat or dock; is that correct?

A. Partially correct. He didn't represent himself as being a [178] member of the local union.

Q. Is everything else substantially correct?

A. Yes.

Q. And from that point on all they requested was that you turn the work over to them from the bull rail out; that is correct, isn't it?

A. From the bull rail out; yes.

Q. But of course you insisted that the I.W.A. continue to do the work; isn't that correct?

A. Yes.

Q. And despite the fact that four men would only be used part time, you shut down the mill rather than hire these two or four longshoremen; is that true? A. No.

Q. You didn't give the work to the longshoremen? A. We didn't shut down the mill—

Q. You didn't give the work to the longshoremen? A. No.

Q. You knew, if you gave the work to the long-

(Testimony of Eugene S. Hawkins.)

shoremen, all the men would return to work and the mill would function at full blast, didn't you?

A. Yes, I presume.

Mr. Andersen: That is all. Thank you. [179]

Redirect Examination

By Mr. Banfield:

Q. Mr. Hawkins, this visit Mr. Andersen spoke of by a representative he spoke of of the local union, and you said he was not a representative of the local union, who did he represent?

Mr. Andersen: That is a conclusion, may it please the Court. He referred to Mr. Albright, referring to some six months before.

The Court: Regardless of what he referred to, if he can state of his own knowledge, he can so state.

Q. Who did he say he represented?

A. He said he represented I.L.W.U. International.

Mr. Banfield: That is all.

Mr. Andersen: That is all.

(Witness excused.)

VERNE ALBRIGHT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Strayer:

Mr. Strayer: We desire that the record show that Mr. Albright is a hostile witness and we reserve the right under the court rule to cross-examine and impeach his testimony if necessary. [180]

Mr. Paul: Your Honor, the defendants are an unincorporated association, and Mr. Albright is not a party, and our court rule goes only to the parties. A foundation must be laid first.

The Court: It is correct that a foundation must be laid for it, but there is no impropriety in apprising that the witness, regardless of whether he is a party or not, is hostile.

Mr. Strayer: Shall I proceed?

Mr. Andersen: Do I understand the Court is permitting the witness to be called as an adverse witness or simply as plaintiff's own witness?

The Court: He is plaintiff's witness.

Q. State your full name, please.

A. Verne Albright.

Q. Where is your home?

A. Ketchikan, Alaska.

Q. By whom are you employed?

A. International Longshoremen's & Warehousemen's Union.

(Testimony of Verne Albright.)

Q. That is the International with headquarters in San Francisco? A. Correct.

Q. How long have you been employed by them?

A. Since the 10th of November, 1947.

Q. Do you have a title? [181]

A. Yes, sir.

Q. What is it?

A. I am classed as International Representative.

Q. What is your territory?

A. Alaska; the Territory of Alaska.

Q. Do you know the names of the officers of the International Longshoremen's & Warehousemen's Union for 1947?

A. In 1947 Harry Bridges was President; Bob Robertson—or R. J. Robertson—was First Vice President; Germain Bulcke was Second Vice President; and Louis Goldblatt was Secretary-Treasurer.

Q. Can you give us the same information for 1948? A. The same officers.

Q. Are they the same today?

A. They were elected in 1947 for a term of office which runs for two years.

Q. Are they the same officers now then?

A. Yes.

Q. What officer do you report to, Mr. Albright?

A. I usually reported to Mr. Bulcke or Mr. Robertson. They are the head of the organization.

Q. The International Longshoremen's & Warehousemen's Union exercises jurisdiction over longshore workers in what part of the continent?

(Testimony of Verne Albright.)

A. The West Coast, Canada and Alaska. [182]

Q. Covering ports of the West Coast, Alaska and Canada? A. Most of them.

Q. Are there any on the West Coast that are not I.L.W.U.?

A. I think Tacoma, Washington, and I believe—you mean——

Q. Do you know what they are?

A. I don't know whether Port Angeles is.

Q. Aberdeen and Anacortes?

A. Anacortes may be.

Q. How about Olympia? A. I.L.W.U.

Q. Are you acquainted with Jack Berry?

A. I met him first this month of April in San Francisco.

Q. Do you know what position he holds with the I.L.W.U.?

A. International Representative in Canada.

Q. Where is his headquarters?

A. On Vancouver Island—Vancouver, Washington; I believe in Washington. Vancouver, B. C.

Q. Do you know what territory—British Columbia, is that his territory? A. Yes.

Q. And now, speaking particularly of Prince Rupert which is in British Columbia, is that in your territory or Mr. Berry's territory?

A. That is in Mr. Berry's territory.

Mr. Andersen: May it please the Court, at this time [183] I am going to object to any testimony regarding Prince Rupert. That is in Canada, and

(Testimony of Verne Albright.)

I understand these gentlemen are proceeding under the law of the United States which has no application in Canada, and I think we would be wasting time regarding that.

The Court: I think what happens in Canada is evidentiary. Objection overruled.

Q. Do you ever perform any duties yourself at Prince Rupert?

A. Occasionally I go over there. I have once.

Q. Were you served with a subpoena, Mr. Albright, to produce certain records?

A. That is right.

Q. Have you brought them with you?

A. I sent a constitution here and the directory of the International Union.

Q. Have you brought any other records with you? A. I had no other.

Q. You were asked to bring with you——

Mr. Strayer: May I have that constitution there (addressing the Clerk of the Court)?

Mr. Andersen: I have the constitution. It is the same one.

Mr. Strayer: Yes. We have agreed or stipulated it is a correct copy of the constitution as it existed in 1947.

Mr. Strayer: April, 1947, I believe. He has sent this directory, but he has already given you the information.

The Court: You say it has already been stipulated that this is the constitution?

(Testimony of Verne Albright.)

Mr. Andersen: Yes.

Mr. Strayer: Yes. Does our stipulation, Mr. Andersen, show this was the constitution at all times since April 11, 1947?

Mr. Andersen: Well, there have been some amendments to that constitution at the last convention which was held last month, but I don't believe——

Mr. Strayer: Other than that, this is it?

Mr. Andersen: I don't believe you have to worry about it. I don't believe there was anything that would have a direct bearing on this. I think it had reference to particular things that we are not interested in.

Mr. Strayer: With that exception it is stipulated that this is the constitution in effect during all that time from 1947?

Mr. Andersen: Yes.

Q. Well now, Mr. Albright, you were asked to bring with you today correspondence and telegrams, or copies thereof, between yourself and the International, or any officer, agent or employee or representative of the International, which you wrote or which you received between October 1, 1947, and April 20, 1949, relating to any labor dispute [185] with the Juneau Spruce Corporation; did you bring any of that material? A. I had none of them.

Q. Where is it?

A. It is my habit not to carry a file——

(Testimony of Verne Albright.)

Mr. Andersen: Just a minute. That assumes there is such.

Mr. Strayer: I don't think it is a violent assumption. Mr. Albright's affidavit is on record saying he did have——

Mr. Andersen: That is assuming something not in evidence.

A. When I receive a letter, I answer it or carry out the instruction, and destroy or tear it up and throw it in the waste basket at whatever hotel I am.

Q. You destroy copies?

A. I don't make copies.

Q. Carbon copies? A. No.

Q. Letters or telegrams connected with the International, you have destroyed?

A. That is general correspondence; yes.

Q. How much correspondence did you have with the International or any officer or agent of the International regarding this Juneau Spruce Corporation dispute? [186]

A. I have had some, not a great deal. I received some correspondence, too, and it was suggested I call on the mill one time. I had one letter from the International that they had discussed it down below and there might be a possibility of settlement.

Q. Not going into what you put in your letters, you did write the International concerning the dispute?

A. Just generally, that the dispute was in progress.

(Testimony of Verne Albright.)

Q. You made a report to them from time to time as to the progress of the dispute?

A. That is right.

Q. Do you make any copies of the reports you make to the International?

A. Any carbon copies, you mean?

Q. Yes.

A. The reports, no. My report is in the form of a letter, and I make one copy and send it to the International Office, 158 Golden Gate Avenue.

Q. So far as you know, Mr. Albright, are those reports or copies of those reports available in Alaska? A. Not to my knowledge.

Q. Are any of the letters or telegrams, or copies of those letters or telegrams, which you received from the International or any officer of the International, available anywhere in Alaska? [187]

A. Not to my knowledge.

Mr. Strayer: I think that is all, your Honor. However, we would like the right to recall this witness later if something develops during the testimony.

The Court: All witnesses are subject to recall.

Mr. Strayer: Any cross-examination?

Mr. Andersen: Not at this time.

(Witness excused.)

HORACE O. ADAMS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Would you state your full name?

A. Horace O. Adams.

Q. Will you tell us what your occupation has been since the first day of March, 1948, whatever position you held?

A. I was agent for the Alaska Steamship at that time.

Q. How long did that continue?

A. Until the first of January this year.

Q. During that time did you have anything to do with the management of any dock in Juneau?

A. Yes. We took over the dock company, Alaska Dock and Storage Company.

Q. Do you mean the Alaska Steamship Company took it over? [188]

A. Yes. When I say "we," I mean the Alaska Steamship Company.

Q. What date was that, Mr. Adams?

A. I couldn't say right now, Mr. Banfield.

Q. In March, 1948, who operated the dock owned by the Alaska Dock and Storage Company?

A. That is a separate company, the Alaska Dock and Storage Company, and Mr. McDonald was the cashier and manager.

(Testimony of Horace O. Adams.)

Q. Is it your job to look after the boats, while in port, of the Alaska Steamship Company?

A. Yes, sir.

Q. I will ask you if you have any knowledge of a shipment of material which arrived at Juneau on Tuesday, March 16th, on the "Baranof" and was assigned to the Juneau Spruce Corporation?

Mr. Andersen: March 16th, what year?

Q. 1948.

A. I remember the incident. I wrote a letter concerning it.

Q. Tell us what happened with respect to that assignment during that time and after it arrived.

A. Our consist wire—that is a wire out of Seattle—I think it was 69 or 70 tons, I am not sure, for the Juneau Spruce Corporation, and it was my prerogative whether I sent the ship to the Juneau Spruce Dock or discharged the freighter at our dock. In other words, it wasn't in the sailing orders of the captain to go to that dock. Anything over 50 tons I could send to the Union Oil or Standard Oil or any other dock, so I called the Spruce Mills and told them how much freight they had and told them we would discharge at their dock.

Q. Go ahead.

A. And then I think the ship arrived at three or four in the afternoon; I am not sure of the time; so I made arrangements to order the longshoremen for the discharge at the Spruce Mills Dock.

Q. Where would those longshoremen be working for the Steamship Company?

(Testimony of Horace O. Adams.)

A. All I hired is the sling tenders.

Q. Did they work in the hold or on the dock?

A. On the dock.

Q. What was that work?

A. To hook on and hook off the slings.

Q. Does the Steamship Company always pay for that service?

A. Yes, sir.

Q. Even though they were working on somebody else's dock?

A. We pay the slingmen.

Q. Go ahead. What happened after you ordered these men?

A. When I ordered the men, I went out to the longshore boss and told him how many men we would need down there. He was with the Chief Mate, Mr. Buckler. He said we would work two gears, so I ordered four sling tenders, and the [190] longshore boss told me, "I might as well tell you right now we are not going to take any freight off at the lumber mill."

Q. Who was the longshore boss?

A. Tony Wukich.

Q. Do you know if he was an officer of Local 16?

A. No, I don't.

Q. What did you do after that?

A. Well, I called Mr. Hawkins and I told him what I was up against, and I said——

Mr Andersen: I object. It is hearsay.

The Court: He is not attempting to relate now what somebody else told him.

(Testimony of Horace O. Adams.)

Mr. Andersen: It is still hearsay and also, as I see it, immaterial.

The Court: I don't apprehend that the witness needs to state what he said, but rather what was done.

Q. Go ahead, Mr. Adams. What did you do? You contacted Mr. Hawkins?

A. I called him on the phone and said, "We can't delay the ship." My version was to put the freight off at our dock, although it would be a terrible expense to the Spruce Mills. He said, "That is up to you."

Mr. Andersen: I move that be stricken as hearsay.

Mr. Banfield: If the Court please, what Mr. Hawkins, [191] told him in a conversation is not hearsay. If Mr. Hawkins said what somebody else said—he is one of the parties to this suit.

The Court: I think it is hearsay. He should state what was done rather than conversation leading up to the doing of it.

Q. Where was the freight unloaded, Mr. Adams?

A. The freight was discharged at our dock.

Q. Now, was there ever any other time that you had any dealings with the Juneau Spruce Corporation and the longshoremen involving shipments for the Juneau Spruce Corporation?

A. I don't know just what you mean. We had lots of dealings. You mean after this trouble?

Q. Yes.

A. Yes. They were desperately in need of—

(Testimony of Horace O. Adams.)

Mr. Andersen: I move that be stricken. The characterization is a conclusion of the witness.

Mr. Banfield: That is correct. Whether they were in need of something makes no difference.

Q. Tell what they did.

A. They offered a shipment of flooring for the westward, finished lumber.

Q. Do you remember about what size of shipment it was?

A. I don't know. It was one or two carlots, ten or fifteen carryall lots. [192]

Q. After they offered this lumber, what else did they do?

A. Well, at that time I had to phone Seattle to find out if I could get space or if I could accept it. Our superintendent said, "As a public carrier, you can't refuse it."

Mr. Andersen: I object.

The Court: So far as the conversation, it is not material.

Q. Mr Adams, just tell us whether or not you agreed to accept it?

A. He said as a common carrier we had to accept it

Mr. Andersen: I move that be stricken, may it please the Court, as hearsay.

The Court: I don't know whether he said that or as a common carrier——

A. Your Honor, my instructions over the phone were that.

(Testimony of Horace O. Adams.)

Mr. Andersen: I move that be stricken as hearsay. That is hearsay.

The Court: Objection overruled.

Q. State the instructions.

A. My instructions were that as a common carrier we had to accept shipments on the dock.

Mr. Andersen: Again I move that be stricken.

The Court: Motion denied.

Q. Mr. Adams, tell us what happened to the lumber.

A. They brought the lumber to the dock. It was signed for by [193] Agnes Dobner who worked on the dock as cashier, who didn't work for us. She worked for the Alaska Dock and Storage Company, as our agents.

Q. In other words, that material was for shipment on an Alaska Steamship Company boat?

A. Yes, sir.

Q. Tell us what happened then?

A. The steamer came in at five or six o'clock and was going out that evening.

Mr Andersen: I would like to interpose an objection, another objection similar to my objection to Mr. Hawkins' testimony that this is incompetent, irrelevant and immaterial in so far as the International is concerned.

The Court: You mean—you better identify just what testimony you are referring to.

Mr. Andersen: At the conclusion of Mr. Hawkins' testimony I made a motion to strike on

(Testimony of Horace O. Adams.)

grounds previously discussed—no foundation and it is not binding on the International.

The Court: You are renewing that?

Mr. Andersen: No. So far as this witness' testimony is concerned, I want to move at the proper time, move to strike.

The Court: It may be admitted subject to the ruling.

Q. Go ahead.

A. We discharged the northbound cargo and loaded out the westbound [194] cargo, and I said, "It is time to load the lumber," and the longshoremen wouldn't load it.

Mr Andersen: I am going to move that be stricken as a conclusion of the witness and not a proper foundation.

The Court: He should state what was done or not done rather than what——

A. They didn't load the lumber from the Juneau Spruce for the westward.

Q. Who refused to load the lumber?

A. The longshore boss at the time, I think, was Joe Guy.

Mr. Andersen: I will object to that as not binding upon the International and not binding upon Local 16.

The Court: Objection overruled.

Q. Was Mr. Joe Guy an officer of the Union, do you know?

A. He was the boss at that time.

(Testimony of Horace O. Adams.)

Q. Boss of the crew, you mean? In your dealings with the longshore crews who do you deal with?

A. I deal with whoever is the boss at that time.

Q. That is customary, is it? A. Yes.

Q. And is that the way you operate under your agreement of employment? A. Yes.

Q. Now, what did you say to Mr. Guy?

A. Well, it was getting late. I said, "We are ready to load [195] lumber." He said, "We are not going to load any lumber. It went through a picket line."

Mr. Andersen: I object.

The Court: I think——

Mr. Strayer: Mr. Guy was a member of Local 16, one of the parties. The reason he gave for refusing to load lumber would be admissible as an admission of the party and explaining the act of Local 16 in refusing to load the lumber.

Mr. Andersen: I don't believe any unincorporated association will be held responsible for acts of a member. If a member gave a mistaken order to refuse or to do something, then by a mistaken order they would be held liable for anything he might say or do. These gentlemen understand the foundation that is necessary. They haven't laid a foundation. Mr. Guy is simply a member.

The Court: If he was down there exercising authority, the presumption would be that he had it. The objection is overruled.

(Testimony of Horace O. Adams.)

Q. What happened to this cargo of lumber? Did you answer the question—what did Mr. Guy say?

A. He said they would not load the lumber because it went through the picket line.

Q. What did you do after that?

A. We pulled the gangplank and sailed the ship.

Q. Before you sailed the ship did you have a conversation [196] with Mr. Druxman?

A. Yes.

Q. Was this conversation after the conversation with Mr. Guy?

A. It was after that—with him.

The Court: With whom?

A. Bob Druxman.

Q. The first time you talked to Mr. Guy, you testified it was in the presence of Mr. Buckler?

A. He was first mate.

Q. Was he present when you talked to Guy about this second incident?

A. Yes.

Q. Was Mr. Druxman there the first time?

A. No.

Q. Was he present the second time?

A. No.

The Court: I am confused between Buckler and Druxman.

A. Buckler was the first mate, and Druxman was the K.I.N.Y. reporter.

Q. After you talked to Mr. Guy in the presence of Mr. Buckler and before the ship sailed, did you have a conversation with Mr. Druxman?

(Testimony of Horace O. Adams.)

A. Yes.

Q. What was Mr. Druxman's occupation at that time? [197]

A. He was the reporter for K.I.N.Y. I think he was jointly with the "Empire" and K.I.N.Y.

Q. And what did you and Mr. Druxman do, if anything?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial.

Mr. Banfield: It depends upon what he and Mr. Druxman did. If he had another conversation with the longshoremen, it wouldn't be immaterial.

The Court: Objection overruled.

Q. What did you and Mr. Druxman do, Mr. Adams? A. Mr. Druxman asked me——

Mr. Andersen: Just a minute. I am going to move that that be stricken.

The Court: Yes; conversation will be stricken.

A. It is the only way to bring it out.

The Court: Since there is an objection, you can't state what was said. You will have to say what was done.

Q. What did you and Mr. Druxman do, Mr. Adams?

A. To get concrete evidence for the news and the paper that the lumber was refused and not taken, we went——

Mr. Andersen: I object.

Mr. Banfield: We will show the purpose.

The Court: Objection overruled.

(Testimony of Horace O. Adams.)

Q. Go ahead.

A. We went to this Joe Guy, and I said, "Will you load the [198] lumber?" And he said, "No, absolutely not."

Mr. Andersen: The same objection to this also, may it please the Court.

A. He said it anyway. I don't care.

Mr. Andersen: The same objection; incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. Was the lumber loaded aboard that boat?

A. No.

Q. What happened to it?

A. It was hauled back to the mill the next day.

Q. Do you remember the date of that, Mr. Adams, or about when it was with relation to the establishment of the picket line down at the mill?

A. I think it was either the day before or the day after the picket line was established, or either that day—I don't know. I wrote some letters, Mr. Banfield. It was on the date of those letters. They should show when it happened.

Q. Do you have a copy of the letter you wrote?

A. I think so.

The Court: Is the purpose of this to establish the exact date?

Mr. Banfield: Yes, your Honor.

The Court: Is that so very important? He said it was within a day or two of the picket line. Is it absolutely [199] necessary to establish it?

(Testimony of Horace O. Adams.)

Mr. Banfield: I want to establish that that is not the time it was. He has a letter.

A. This letter was written May 6th relative to the "Baranof," Voyage 21, Juneau Spruce Corporation, April 27.

Q. Was the date the 27th or——

A. This is a letter in which I explained what happened. It is kind of a long letter, three pages.

Q. Which sailing of the "Baranof" was it?

A. Voyage 21, April 27th.

Q. Does the 27th mean the date it arrived in Juneau?

A. No. Out of Seattle.

Q. The date it left Seattle? A. Yes.

Q. And how many days later approximately did it arrive in Juneau?

A. Three days later, the 30th.

Mr. Banfield: That is all.

Mr. Andersen: No questions.

(Witness excused.) [200]

HENRY GREEN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Will you state your name please?

A. Henry Green.

(Testimony of Henry Green.)

Q. Were you subpoenaed to testify this afternoon?
A. I was.

Q. What is your occupation at the present time?

A. Agent for the Alaska Steamship Company.

Q. At Juneau?
A. At Juneau.

Q. Tell me what was your occupation during the month of August, 1948?

A. I was agent for the Alaska Steamship Company from about the 6th of August on.

Q. Until the present time?

A. Until the present time.

Q. Now, in connection with your duties did you also have anything to do with managing a dock after August 6th?

A. Yes. Agent for the Ketchikan Wharf Company?

Q. And who was the Ketchikan Wharf Company?

A. It is a dock company operated by the Alaska Steamship Company.

Q. A subsidiary corporation? [201]

A. Yes.

Q. What dock do they operate?

A. It is known as the Alaska Dock in Juneau.

Q. Is that the same dock that was operated just before that in May, 1948, by the Alaska Dock and Storage Company?
A. Yes.

Q. That is the dock where the Alaska Steamship boats have landed for years; is that right?

A. That is right.

(Testimony of Henry Green.)

Q. Mr. Green, did you have any requests in August, 1948, from the Juneau Spruce Corporation to ship any lumber by Alaska Steamship boats?

Mr. Andersen: I object to that as hearsay, incompetent, irrelevant and immaterial.

The Court: You can answer that yes or no.

Q. Did you have any such requests?

A. Yes.

Q. What was the request?

Mr. Andersen: I renew the objection.

The Court: Yes; I think that anything calling for conversation would have to be excluded, and it seems to me your purpose might just as well be served by eliminating it. Have him state what was done.

Mr. Banfield: There was nothing done except a particular conversation in this particular case.

The Court: By whom?

Mr. Banfield: Juneau Spruce Corporation and Mr. Green who tried to comply with the request, and the longshoremen who wouldn't permit him to comply with the request, and he reported to the Juneau Spruce. No lumber was moved, or nothing else was done.

The Court: If it is necessary to show what the defendant did, why it might be admissible, but ordinarily that can be shown without bringing out the details of the conversation.

Mr. Banfield: I am afraid, if the Court please—we have to show what the request was, and the longshoremen——

(Testimony of Henry Green.)

The Court: You may proceed.

A. What was the question?

Q. What was the request made by the Juneau Spruce Corporation at that time?

Mr. Andersen: The same objection.

The Court: I have already ruled on it. Go ahead.

A. They requested to ship some lumber either to Seattle or to the westward.

Q. And what did you do pursuant to that request?

A. I informed them that I would be glad to handle their lumber.

Mr. Andersen: I object to all this line of conversation as immaterial and hearsay. [203]

The Court: I still think he could answer that he couldn't do it because the defendant presumably refused and without stating conversation.

Q. Did the Alaska Steamship Company ship this lumber? A. Did the——

Mr. Andersen: I object to any reference of lumber. There is no testimony——

Mr. Banfield: The witness testified the Juneau Spruce Corporation requested——

Mr. Andersen: I thought you had sustained my objection.

The Court: You may answer the question.

Q. Did you ship the lumber on the boat?

A. No.

Q. Why didn't you ship the lumber on the boat?

(Testimony of Henry Green.)

Mr. Andersen: I renew the same objection. It is hearsay, incompetent, irrelevant and immaterial.

The Court: It seems to me it goes to his personal knowledge. Objection overruled.

A. What was the question?

Q. Why didn't you ship the lumber on the boat as requested?

A. Because the longshoremen notified me they would not load it.

Mr. Andersen: I move the answer be stricken also as hearsay, may it please the Court, and no showing has been [204] made in connection with the defendants.

The Court: I think the answer should be followed up by showing who it was.

Mr. Banfield: That is exactly what I can do.

Q. Who was it that told you that they would not ship the lumber?

A. The delegate, Joe Guy.

Q. What was his position with respect to Local 16?

A. You mean, what position did he occupy in the Local?

Q. Yes; or in his dealings with you?

A. At that time he was a member of the Labor Relations Committee of the Union and the delegate and—that is all.

Q. Was he the man you would customarily deal with at that time on such matters? A. Yes.

(Testimony of Henry Green.)

Q. Now, Mr. Green, if this lumber had been shipped, what would the longshoremen have done with it? What would have been their duties?

Mr. Andersen: I object to that as immaterial, may it please the Court.

Mr. Banfield: It is to show, your Honor, what they refused to do.

The Court: I presume they would put it aboard the ship.

Mr. Banfield: That is all he has to say. [205]

Q. What would they do?

A. If it was loaded at our dock, they would have loaded it aboard the ship. At the Spruce Mill they would have handled it if they worked two hatches aboard ship, or the slingmen would have handled it.

Q. If that was your job, who moved it from the warehouse to the face of the dock?

A. The longshoremen.

Q. And who attached the slings?

A. The longshoremen.

Q. And who stowed it in the hold if they worked one hatch?

A. The sailors.

Q. And if they worked two hatches?

A. The longshoremen, presumably.

Mr. Andersen: I move that be stricken as purely speculative, may it please the Court.

The Court: Yes; it seems quite speculative and not what has been done or anything of that kind.

Q. Was there any other way this lumber could

(Testimony of Henry Green.)

have been loaded aboard ship except by the use of these longshoremen?

A. That is a hard question for me to answer.

Q. You can explain it as you see fit.

A. Not and comply with the terms of our agreement with the longshoremen.

Mr. Andersen: I move that be stricken as not responsive. The question was—was there any other way to load it? It has nothing to do with contracts.

The Court: Objection overruled.

Q. Did you have a contract with these longshoremen to do that particular type of work?

A. Yes.

Q. Was it in force when this happened August 14, 1948? A. Yes.

Q. I believe it was on or about August 14, 1948; was it?

Mr. Andersen: I move that be stricken. The contract would be the best evidence if it is in force.

The Court: Objection overruled. It is a purely collateral matter. It is to show their method of loading it. A. What was the question?

Q. This incident you spoke about when you contacted Mr. Guy and he refused to load the lumber, when was that?

A. The first part of August.

Q. What year? A. Last year.

Q. Do you remember the words that were used by Joe Guy when you asked him to do this—

(Testimony of Henry Green.)

Mr. Andersen: Same objection.

Q. And he refused?

Mr. Andersen: Same objection, may it please the Court. [207]

The Court: Objection overruled.

A. He said, as a slang term, "No soap," I believe.

Mr. Banfield: That is all. You may cross-examine.

Mr. Andersen: No questions.

(Witness excused.)

(Whereupon Court recessed for ten minutes, reconvened as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

EUGENE H. CARD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. State your name please.

A. Eugene H. Card.

Q. Where do you reside?

A. Coos Bay, Oregon.

Q. Do you have any relationship with the Juneau Sprue Corporation? A. I do.

Q. What is that?

A. Labor Relations Adviser.

(Testimony of Eugene H. Card.)

Q. Mr. Card, have you had any occasion to have any meetings as such Labor Relations Adviser with Mr. Hawkins in the [208] presence of a Union committee here in Juneau? A. I have.

Q. Tell me the first such incident.

A. The first meeting was October 23, 1947.

Q. And with whom did you meet and about what time of the day?

A. The meeting was at 2:00 o'clock in the afternoon. Those present were: Mr. Hawkins and myself for the Company; and a Mr. George Ford, a Mr. McCammon and a Mr. Burgo, representing the I.L.W.U.

Mr. Andersen: Local 16, I assume?

Q. Were they representing the International or the Local?

A. I believe they were representing the Local.

Q. And who was the spokesman for the Company at that meeting? A. I was.

Q. And who was the spokesman for the I.L.W.U., Local 16?

A. Mr. Ford was the principal spokesman.

Q. Just tell us what occurred at that meeting and what was said and done.

A. Mr. Ford opened the meeting by stating that they wanted us to sign a contract with the Local. I asked him if they represented any of our employees. He said they didn't; they didn't have anybody working at the plant at the time; but we had to sign a contract with them just the same.

(Testimony of Eugene H. Card.)

I told them we were negotiating with the I.W.A. and recognized the I.W.A. as bargaining agent for all our employees [209] at the plant and couldn't and wouldn't sign a contract with any other union. And Mr. Ford said, "Well, if you don't sign a contract, you will never get that bargeload of lumber unloaded when it gets down to Seattle." They started out the door. Then Mr. McCammon turned around and said, "Wait a minute, fellows." He called the other two back in. He said, "How about paying for those men we sent down here?" I asked him what men he was talking about. He said that they had sent down a couple of men to pile carrier blocks. I told him we hadn't ordered anyone to pile those blocks, that we only paid the men we employed directly and didn't pay men sent by outsiders and, if they were going to be paid, they would have to be paid by the longshoremen if they were the ones that sent them down. He said, "We will see about that," and they left.

Q. Did you have any other meetings that same day? A. Not that same day; no.

Q. Well, that evening did you have any meeting, or the next day, or when was the next meeting with the Union?

A. I didn't have any further meeting with the I.L.W.U.

Q. I mean with any other union?

(Testimony of Eugene H. Card.)

A. Yes; about two days later I had a meeting with the I.W.A. committee.

Q. Who was present at that meeting?

A. Glen Kirkham, Dan Livie, Chris Lee, Tim O'Day and one [210] other committee member from the I.W.A., and Mr. Hawkins and myself from the Company.

Q. You think that would be about October 25th?

A. About that date.

Q. Tell me what was done at that meeting.

A. We discussed the proposed working agreement, and this was the agreement——

Mr. Andersen: We object to this, your Honor, as hearsay, may it please the Court.

The Court: It is the same kind of hearsay that has been going in about all these discussions. Objection overruled.

Q. Go ahead.

A. We discussed the working agreement that I had revised and talked about the meaning of various clauses, and the I.W.A. committee said that they would like to have a little time to study it over a little further, and we said that would be all right, so they took it with them, and a few days later they asked for another meeting.

Q. And who was present at this meeting a few days later?

A. The same committee, the same persons that had been present on the 25th.

Q. And what happened at that meeting?

(Testimony of Eugene H. Card.)

A. We discussed the proposed agreement further and made some changes in the wording of it in a few places, bringing it into conformity with the understanding on both sides, and it was agreed that the contract would be typed up and signed.

Q. Was there any discussion at that meeting regarding the union recognition clause which was later embodied in the agreement of November 3, 1948—1947?

A. At one or the other and perhaps both meetings with the I.W.A. there was discussion on that point; yes.

Q. Tell us what the discussion was.

A. Well——

Mr. Andersen: I assume my objection runs to all of this, your Honor?

The Court: As I see it, since this is a meeting with the I.W.A., it wouldn't appear to be material to bring out the details of the discussion, would it?

Mr. Banfield: If the Court please, only for the purpose of showing what was intended under this agreement, and later to show how it operates.

The Court: I think he can state what was intended by the agreement without relating the discussion.

Mr. Banfield: Very well.

Q. Tell us what was agreed regarding the union recognition clause.

A. It was agreed the union recognition clause would cover all employees of the Company regard-

(Testimony of Eugene H. Card.)

less of what work they were [212] doing, with the exception of those named as being specifically excluded.

Q. Was there mention made of an agreement made as to whether or not this clause covered the barge loading which has been testified was going on on October 23rd?

A. Yes, it was. It was understood by the two committees, the I.W.A. committee and the Company committee, that barge loading was included as all other work in the plant.

Mr. Andersen: I renew my objection. It is his understanding. It is hearsay.

The Court: It isn't his understanding. The witness is testifying to what they interpreted or what interpretation they agreed on that that clause should receive. The motion is denied.

Q. Was any understanding or agreement reached with the approval of the I.W.A. International?

Mr. Andersen: Same objection.

A. There was.

Q. And what was the agreement in that respect?

The Court: Well, how could they bind the International by their agreement?

Mr. Banfield: If the Court please, they couldn't. The only question was whether or not they had consulted with their International and were doing it in accordance with their policy. [213]

The Court: I thought you meant the Longshoremen's International.

(Testimony of Eugene H. Card.)

Mr. Banfield: Oh, no. The I.W.A. International.

The Court: You may answer.

A. Will you read the question please?

Court Reporter: "And what was the agreement in that respect?"

A. Well, the agreement was that the recognition clause, that the barge loading was covered in the recognition clause, as well as all the other work, with the knowledge and the understanding of the I.W.A. International Office.

Q. It was done with their approval?

A. Yes.

Q. Now, when was this agreement actually typed up?

A. Between about the 29th of October when we had our last negotiating meeting and the 3rd of November when the agreement was signed.

Q. Do you remember, Mr. Card, when Mr. Hawkins left town about that time?

A. He left right after our last meeting with the I.W.A., about the 29th or 30th; I think about the 30th of October.

Q. Did he leave any instructions about signing this agreement?

A. He did.

Q. What were they?

A. My instructions were to sign the agreement in his name. [214]

Q. And was that done?

A. It was.

Q. On what date?

A. November 3, 1947.

(Testimony of Eugene H. Card.)

Q. After that what did you do, Mr. Card?

A. I went back to Coos Bay.

Q. And when did you come back to Juneau again? A. April 13, 1948.

Q. And would you tell us what the conditions were at the plant at that time?

A. There was an I.L.W.U. picket line at the plant, and the mill was not in operation.

Q. Have you any idea how many men were working there at that time?

A. How many men were actually working?

Q. Yes. A. At the plant?

Q. And in the office and so forth; what classification of men were there?

A. Well, on the 13th I think there were only watchmen and office employees working at that time.

Q. Now, do you know the policy of the Juneau Spruce Corporation with respect to hiring long-shoremen? A. I do.

Q. What is that policy? [215]

A. It is to hire them as well as anyone else if they apply for work in the mill and there is work that they can handle.

Q. And if they should apply for work and work there in the mill, who would be their bargaining representative? A. I.W.A.

Q. Could they bargain individually with the employer?

A. No. They don't bargain individually down there.

(Testimony of Eugene H. Card.)

Q. Could the employee come in and ask for a raise—that is all I want to know?

A. No. The I.W.A. is the collective bargaining agent.

Q. I am not speaking of collective bargaining, but, if a man individually would like a raise in pay can he come in and ask the boss for a raise?

A. No. The Union is his bargaining agent.

Q. Would the Union bargain for all of them?

A. Yes.

Q. Does the Company have any objection to the longshoremen attending the slings, attaching the slings, of commercial vessels which are loading lumber to be shipped from the Company's dock?

Mr. Andersen: I think I will object to this line of questioning. It is purely cumulative. They have gone over the same matters. It is just cumulative.

The Court: I have lost the form of the question. In view of the objection, will you read the question?

Court Reporter: "Does the Company have any objection to the longshoremen attending the slings, attaching the slings, of commercial vessels which are loading lumber to be shipped from the Company's dock?"

The Court: Objection overruled.

A. No. We have never objected because we have nothing to do with it.

Q. Does the Company hire those men?

A. No.

(Testimony of Eugene H. Card.)

Q. What is the Company's objection to hiring longshoremen to load barges?

Mr. Andersen: The same objection, may it please the Court. It is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Because we have an agreement with another union under which that work is covered. We can't break our agreement with the I.W.A. and take the work away from them and give it to somebody else just because they come along and ask for it.

Q. Mr. Card, April 13th when you arrived here were the I.W.A. willing to allow the longshoremen to do this work?

A. I think there might be some question about that.

Q. Well, what do you know of your own knowledge as to whether they did, or how would you qualify it? [217]

A. I talked to Mr. Peterson, who was then the Vice President of the I.W.A., and to Mr. Gustafson, who was then Secretary of the I.W.A., and they told me——

Mr. Andersen: Just a moment. I am going to object to that as hearsay, may it please the Court.

The Court: I think that conversation should be eliminated as far as possible.

Q. What was the position of the I.W.A., or factions of it if there was more than one position? Just tell us what the facts were.

(Testimony of Eugene H. Card.)

Mr. Andersen: That calls for an opinion of the witness, may it please the Court.

The Court: Objection overruled.

A. I was told that——

Mr. Andersen: This is hearsay, may it please the Court.

The Court: Just eliminate conversation as far as you can and state what the decision was or what the outcome of the discussion was, or something of that sort, rather than to relate the details of the conversation.

A. The decision, as I understand the situation, your Honor, the decision was that there was apparently an agreement between the longshoremen and the Mill Company.

Q. Which mill company?

A. The Juneau Spruce Corporation. And the I.W.A. was willing [218] to give up that work in view of what they understood was this agreement between the longshoremen and the mill, the Juneau Spruce Corporation.

Q. How did they claim this agreement had come into effect?

Mr. Andersen: The same objection. It is hearsay and calling for a conclusion and opinion of the witness.

The Court: You might ask him to what agreement they referred.

Q. To what agreement did they refer?

(Testimony of Eugene H. Card.)

A. The I.W.A. men were referring to a supposed agreement they were told by the longshoremen was in effect.

Q. Between whom?

A. Between I.L.W.U. 16 and the Juneau Spruce Corporation.

Q. How did that supposed contract come into effect with the Juneau Spruce Corporation.

A. That I couldn't answer. There wasn't any such contract, and I couldn't tell you how it came into effect; there wasn't any.

Mr. Andersen: I object to that as a conclusion and opinion of the witness. I think it is going deep into the hearsay field.

The Court: He merely answered that he doesn't know how the idea gained ground that there was such a contract.

Mr. Banfield: I don't believe that is what he answered, your Honor. [219]

Q. Did they tell you how this contract was supposed to have come into effect between the Juneau Spruce Corporation and the I.L.W.U.?

A. No. They just understood that there was such a contract. They had been told by the longshoremen that there was such a contract.

Q. Did you tell them that there wasn't?

A. I certainly did.

Q. Did you know at that time what particular contract they were referring to? A. No.

Q. Now, were there any other reasons why the

(Testimony of Eugene H. Card.)

Juneau Spruce Corporation was not willing to make an agreement with the I.L.W.U.?

Mr. Andersen: I object to that as immaterial, may it please the Court.

The Court: Objection overruled.

Mr. Andersen: And calling for a conclusion and opinion of the witness.

A. Well, yes. You can't just go around and make contracts with anybody that comes along. We had a contract with a union that covered all our employees.

Q. Did you have any objection to making two contracts, with two organizations?

A. Yes, of course. [220]

Q. What were the reasons for it?

A. You can't take work away from one group of men and give it to somebody else.

Mr. Andersen: I object to that as a conclusion and opinion of the witness.

The Court: Motion denied.

Q. If you took the work away—did it make any difference to you who did the work? Who did you want to do the work?

Mr. Andersen: That is a complex question.

Q. Did it make any difference to the company?

A. It made a difference in this respect; yes. We couldn't permit the I.W.A. to violate their agreement any more than they would permit us to violate ours.

Q. Of course people can call off an agreement if they want to?

A. Yes.

(Testimony of Eugene H. Card.)

Mr. Andersen: I object.

Q. Why were you unwilling to void the agreement with the I.W.A. and draw up another excluding barge work?

A. If we had let the agreement go then and sign with the longshoremen, the next day some other union would be down and say, "We want an agreement covering machinists," or, "We want an agreement covering painters," or, "We want an agreement covering carpenters." We weren't just going to open road to everyone in the Territory coming in and covering [221] small groups of people.

Q. Was there any other reason you can think of now? A. None that I know of; no.

Q. Do you know, Mr. Card, how long the mill was closed down?

A. It was closed from the 10th of April to the 19th of July.

Q. And during that time was there any logs sawed for production of lumber?

A. Not up to the 19th of July; no.

Q. Did any of the I.W.A. men to your knowledge participate in the picket line?

A. Not to my knowledge.

Q. Have there been any longshoremen or members of Local 16 working for the corporation after October 23, 1947?

A. Not as long as to my knowledge.

Q. Could there have been some working in the mill just as general mill hands?

(Testimony of Eugene H. Card.)

A. There could have been.

Q. Mr. Card, was there any loading of barges with lumber for shipment to the United States after the picket line was established?

A. I don't recall any being loaded after the picket line was established.

Q. How long were you here after April 13th?

A. Until the 20th of May.

Q. Was there a barge being loaded at the time you arrived [222] here on April 13th?

A. It had just been loaded and, I believe, left here that day.

Q. The same day you arrived?

A. No. I think it left here the morning the picket line was put on the plant.

Q. Mr. Card, does the Juneau Spruce Corporation maintain any office in Portland?

A. Not to my knowledge.

Q. Do you know the President of the Corporation?

A. Yes.

Q. What is his name?

A. H. F. Chaney.

Q. Does he have a private office of his own in Portland?

A. Yes, he does.

Q. Is it established just for doing business with the Juneau Spruce Corporation or in connection with other business that he does?

A. It is in connection with other business.

Q. Is that the only office that might be termed an office of the Juneau Spruce Corporation in Portland?

(Testimony of Eugene H. Card.)

A. That is the only one I can conceive of, and I certainly wouldn't call that a Juneau Spruce Corporation office.

Mr. Banfield: I think that is all. [223]

Cross-Examination

By Mr. Roden:

Q. Mr. Card, how long have you been Personnel Officer for the Company?

A. Since about the middle of April, 1947.

Q. And did you occupy a similar position before that?

A. No. There wasn't any Juneau Spruce Corporation.

Q. Not necessarily Juneau Spruce; but any other company?

A. Yes.

Q. For how long did you occupy this position?

A. With the other company?

Q. Yes.

A. I have been employed by the Coos Bay Lumber Company since April 1, 1945.

Q. And prior to that time what was your occupation?

A. Oh, between the 1st of March, 1942, and April 1st—it was 1946 I went to work for Coos Bay Lumber Company—between March 1, 1942, and April 1, 1946, I was employed by associations representing employers in the lumber industry in the matter of labor relations.

Q. Have you ever represented any unions?

(Testimony of Eugene H. Card.)

A. I have.

Q. For how long a period of time?

A. From the 8th of June, 1937, to the 28th of February, 1942.

Q. So practically all the time since [224] the passage of the Wagner Act, as it has been called, you have been engaged more or less in labor relations and are pretty well informed about the law as exemplified in the Wagner Act and the Taft-Hartley Act?

A. Yes; I feel I am rather familiar with the law.

Q. You are the gentleman who prepared the contract which was executed on the 3rd of November between the Juneau Spruce Corporation on the one hand and the I.W.A. on the other; that is true?

A. I didn't prepare it all by myself; no.

Q. You scrutinized it in all respects?

A. Yes.

Q. It was submitted to you for careful consideration?

A. Yes; that is right.

Q. And you did?

A. Yes, sir.

Q. And you did your best to make a good contract?

A. Yes, sir.

Q. This recognition clause, so called, where did you get that from?

A. It is the same as in the previous contract the I.W.A. had with the Juneau Lumber Mills.

Q. That is right?

A. Yes.

Q. Do you remember the date of that contract, Mr. Card? [225]

A. November 3, 1947.

(Testimony of Eugene H. Card.)

Q. I mean the one between the Juneau Lumber Mills and the I.W.A.

A. No, I don't remember the date of that.

Q. That was several years old, wasn't it?

A. I think it was.

Q. So you copied that literally out of that former contract?

A. No, sir; I didn't copy it.

Q. What did you do? You adopted it?

A. The clause was in the contract which the I.W.A. presented to us, which in turn was presented to me for consideration, and I made several changes in the contract they had proposed, and it was under the revised contract that we started our negotiations about the 25th of October. I did not change the recognition clause, the wording of it as it had appeared in the contract presented by the I.W.A.

Q. But you say it was the understanding between the Corporation, the Spruce Corporation, and the I.W.A. people that the contract should cover everybody employed by the Juneau Spruce Corporation except those particularly excepted, the superintendent, foremen and office force.

A. All those at the Juneau plant; that is right.

Q. Why did you say this in this recognition clause—and it shall be “recognized as the sole and exclusive collective bargaining agent,” that is the Union shall be, “for all [226] the employees of the Employer,” and then you keep on. First of all you say, shall be “the exclusive collective bargaining agent for all the employees of the Employer”?

(Testimony of Eugene H. Card.)

A. That is right; all the employees.

Q. And then you go and say in which departments, namely, in the sawmill, in the manufacturing and in the retail departments. If it covered all of the employees, why say it is to cover those in these three departments, and no others?

A. Those were the general divisions of the operation down there, Mr. Roden, and, as the I.W.A. committee explained it to us, they wanted to be sure they got in all the general departments of the general outline of the divisions of the plant so there would be no misunderstanding.

Q. But it says "all employees." It meant all of them, didn't it?

A. Yes.

Q. It didn't need any further definition; is that right?

A. Well, that may have been. I don't know what their particular reason was for wanting those three words in there. It didn't make any difference. It didn't do any harm.

Q. Wasn't this the reason—because it was that way in the contract which they had with Rutherford?

A. They never said so. If that was the reason, I am sure I couldn't tell you. [227]

Q. At the time there was considerable talk about as to who should load the barges, isn't that right?

A. There was. I brought that up myself.

Q. As a matter of fact, that was about the last thing to be agreed upon before the contract was

(Testimony of Eugene H. Card.)

signed. You say it was mentioned and you understood that the barge loading was to be done by the sawmill workers; is that correct?

A. That is correct.

Q. Why wasn't that put in the contract if it was of such tremendous importance?

A. The contract, the recognition clause, already covered all work at the plant, Mr. Roden, and it was unnecessary and it is not the way these contracts are drawn up, to write in the one specific job classification and leave the others out. The wording of that recognition clause covered barge loading as well as other work at the plant, except odd-job classifications, which were excluded. It was unnecessary to write it in specifically. It included barge loading.

Q. That is your estimation of it, isn't it?

A. Yes, surely.

Q. But that wasn't the explanation the long-shoremen gave, was it?

A. They didn't have anything to say; they weren't involved.

Q. Which Peterson, the Secretary of the I.W.A., and Gustafson, another member of their committee, put on it when they talked to you later on, was it? Just say yes or no, that was not the interpretation which they put upon it?

A. Mr. Peterson and Mr. Gustafson were not present at the negotiation.

Q. When they talked to you, they were members of the I.W.A. when they talked to you in April?

(Testimony of Eugene H. Card.)

A. They didn't talk about that. I already testified to [228] what they said.

Q. What did they say?

A. They said they understood the longshoremen had a contract with the Juneau Spruce Corporation and they were willing to give up the work in view of that contract.

Q. Didn't they tell you when you had the hearing over here before the Mayor sometime in May, 1948, that the loading of all water-borne transportation was the longshoremen's work, according to the interpretation of their contract?

A. I wasn't present when Mr. Peterson and Mr. Gustafson testified before the Mayor's committee. If they testified, they didn't tell me.

Q. You weren't there?

A. I was only there at the time I testified myself.

Q. When the longshoremen's committee, together with the committee from the I.W.A., came to see you and Mr. Hawkins, they also told you, that is, the representatives of the I.W.A. told you, that in their opinion the loading of the barges belonged to the longshoremen. Isn't that true?

A. You are confused, sir. I never attended any joint meeting of the I.W.A. and the I.L.W.U.

Q. Isn't it a fact that the I.W.A. had at least two meetings, at both of which they passed a resolution saying that the loading of water-borne transportation here mentioned [229] was work of the longshoremen?

(Testimony of Eugene H. Card.)

A. I am not an I.W.A. member. I didn't attend their meetings.

Q. You never heard?

A. If you are asking for hearsay——

Q. Never mind. You were advised what went on prior to the picket lines being put up?

A. Not having been present——

Q. You had been told?

A. Not having been present, I can't say exactly.

Q. You want to tell the jury, and the Court, that you didn't keep yourself informed of the meetings of the I.W.A. with reference to the picket line? Is that what you want us to understand?

A. I don't know everything that took place.

Q. I didn't ask that. I am asking you if you want the Court and jury to understand now that you don't know what transpired at the meetings that the I.W.A. held a day or two before the picket line——

A. I would like the Court and jury both to understand that I don't know everything that took place.

Q. You are not answering.

A. I am trying to. If I understand or am wrong, and I am trying to understand, I wish to answer truthfully and honestly any questions. If you would like to repeat [230] your question, I will——

Q. Do you want us to understand, I will take that back. Do you know that there were meetings held here a day or two before the picket lines were established, don't you?

(Testimony of Eugene H. Card.)

A. I have been told there were.

Q. And you have been told what transpired at those meetings as far as the position the longshoremen took and the position the woodworkers took. Haven't you been informed of that?

A. I heard the testimony at the N.L.R.B. hearing last September; yes.

Mr. Roden: That is all.

Cross-Examination

By Mr. Andersen:

Q. Mr. Card, you entered into a contract with the I.W.A. on what date?

A. The contract was signed November 3, 1947.

Q. And, as I understand it, you negotiated that contract between October 23 and November 3. Is that correct?

A. The final meetings were held at that time; yes, sir.

Q. The final meetings were held when?

A. Between October 23 and November 3.

Q. In other words, there were differences between all of you and no formal contract was entered into until the [231] differences were adjusted on November 3. Is that correct?

A. That is right, sir.

Q. When the longshoremen called on you on October 23, then there was no contract between you and the I.W.A., was there?

A. No signed agreement, that is right.

(Testimony of Eugene H. Card.)

Q. There was no contract between you on that date, was there? A. No signed contract; no.

Q. Will you answer that question. There was no contract between you on that date, was there?

The Court: As to whether it was signed or not?

Mr. Strayer: That calls for conclusions. I don't know if the witness can say if the parties were legally bound.

Mr. Andersen: I will withdraw that question.

Q. As you stated, November 3 was the final meeting. You straightened out the difficulties on October 23, the meeting of the 25th and 29th, and at the meeting of the 3rd the difficulties were adjusted and the contract signed? A. Yes.

Q. On October 23 you told the longshoremen that you had a contract with the I.W.A.?

A. I don't believe I testified I did. [232]

Q. Did you tell the I.W.A. representatives on October 23 that you wouldn't hire longshoremen because you had a contract with the I.W.A.?

A. I don't believe so.

Q. You made no such statement?

A. No, sir.

Q. You met with the committee of the I.L.W.U. on the 23rd? A. That is right.

Q. You told them you wouldn't enter into a contract, didn't you? A. That is right.

Q. Did you tell them the reason you wouldn't sign a contract with them on that date?

A. Yes.

(Testimony of Eugene H. Card.)

Q. What was the reason you gave?

A. That we recognized the I.W.A. as bargaining agent for the employees at the plant and the I.L.W.U. did not represent any employees and was not entitled to a contract.

Q. Is that the only reason you gave them?

A. That is all.

Q. That is all you said on that subject, is that right?

A. That was sufficient.

Q. I understand that was the meeting with Mr. Ford of the I.L.W.U., Mr. McCammon and Burgo?

A. Yes.

Q. You were present?

A. Yes.

Q. And Mr. Hawkins was present?

A. That is right.

Q. Subsequently did you have a conversation or conference with the I.L.W.U. representatives here in Juneau?

A. Not until sometime in the latter part of April, I think around the 20th or 25th of April of 1948.

Q. Did they ask you at that time to sign a contract with them?

A. Yes.

Q. At that time you said you wouldn't sign a contract with the I.L.W.U. because you had a contract with the I.W.A., is that correct?

A. I believe that is right.

Q. And as I understand it, your position with the company is to sort of look out for their labor relations?

A. That is right.

Q. Your job, as I assume, is to so shape the

(Testimony of Eugene H. Card.)

policy of the company that labor difficulties will be avoided if possible? A. If possible; yes, sir.

Q. It is not the policy of your company to foment any labor disturbances, is it?

A. Definitely not. [234]

Q. I assume part of your job is to cut and fit—you testified that adjustments were made when possible—to the end that there will be no cessation of labor at your plant. Is that true?

A. Not entirely. It is not my job to do something wrong,

Q. That is inherent in what I said, sir, but I mean within the area of reasonable judgment and reasonable policies. It is then your job to cut and fit to the end that there will be no cessation of labor and your plant will operate. Is that true?

A. Well, it is never the desire of the company to have labor difficulties, naturally.

Q. Your job is to try to avoid them, is that right?

A. If possible.

Q. And go to all reasonable extents to prevent them? A. Within the law.

Q. Within the law and within reason, is that correct?

A. No one ever gave me definitely those instructions. It might be.

Q. Don't I fairly state your office?

A. I expect that is the work of most any labor relations man.

Q. Between November 3 of 1947 and April 13 of 1948, were you here in Juneau?

(Testimony of Eugene H. Card.)

A. I left here, I think it was the 6th of November, 1947, [235] and didn't come back until April 13.

Q. You came back when there was this trouble at the mill, and you came back, I assume, for the purpose of trying to adjust any difficulties that were there?

A. I came back to see what the situation was to see what should be done about it.

Q. And if possible, so far as you were concerned, and consistent with your office of personnel management and labor relations advisor, to take such steps and advise the company in the operation of the mill?

A. That might be a little far-fetched to assume. I came back to see what could be done.

Q. Within reason, to get the mill operating again?

A. I always try to be reasonable. I don't know.

Q. Some people have more difficulty in being reasonable than others.

A. I found that out, sir.

Q. You came back as the reasonable person to see what to do about ironing out the trouble?

A. I came back at the request of Mr. Hawkins.

Q. To assist in trying to get things going again?

A. If possible.

Q. All right. When you came back you learned that the I.W.A. was ready to turn all this work over to the I.L.W.U., didn't you? [236]

A. Now you have got me on the spot. If I an-

(Testimony of Eugene H. Card.)

answer that question, you would say it is hearsay. I was told by Mr. Hawkins at that time that they were willing.

The Court: If he asks for hearsay you can give it to him.

A. Very well, sir.

Q. I think I know the rules of evidence and it is cross-examination. I can do it. You were told by the I.W.A. Union that the I.W.A. Union was perfectly willing to turn the work over to the I.L.W.U., isn't that true?

A. Yes, I think you could put it in those words, to that effect; yes.

Q. As I understand your testimony, you wouldn't turn the work over to the I.L.W.U. because you had a contract with the I.W.A. Is that correct?

A. It certainly is.

Q. And I assume you told the I.L.W.U. that, in substance, to wit, that you wouldn't sign a contract with the I.L.W.U. regarding this longshore work from the bull rail out, because you had a contract with the I.W.A. Is that substantially correct, sir?

A. You are referring to the meeting in April?

Q. Whenever it was—your conversation with the I.L.W.U.

A. The only one I had after I came back here was in the office of the Territorial Commissioner of Labor, and [237] Mr. Evans was representing the Commissioner of Labor, and he——

Q. Regardless of the time, sir, I am only con-

(Testimony of Eugene H. Card.)

cerned with this: did you tell the I.L.W.U. that you wouldn't turn the work over to them because you had a contract with the I.W.A.?

A. I did, sir.

Q. That was sometime in May or April, was it?

A. Yes; in April.

Q. Now, I assume you understood at this time—you stated you are familiar with the Wagner Act—that under that law you could hire anybody you wished, whether he belonged to the Union or not, you understood that?

A. I wouldn't put it that way, sir.

Q. You wouldn't put it that way? A. No.

Q. That isn't the way you interpret the Taft-Hartley Act? A. It is now; yes.

Q. Did you understand that under the Taft-Hartley Act that you could hire anybody you wanted, regardless of if he belong to a union or not?

A. It depends on what kind of a contract——

Q. Will you answer the question?

A. Will you repeat the question?

Q. Did you understand that under the Taft-Hartley Act that [238] you could hire men to work for you in that mill, whether or not they belonged to a union? A. Surely I do.

The Court: Your question was in the past tense and his answer was in the present. I don't know whether he had knowledge at that time or the present time.

Q. Let's say October 23, let's put it October 23,

(Testimony of Eugene H. Card.)

1947, ten days or so before the contract was signed, you knew at that time—did you know that you could hire men to work in that mill whether or not they belonged to a union, you knew that, didn't you?

A. I knew I could hire men to work in the mill regardless of union affiliation. Does that answer your question?

Q. Yes, that answers it very satisfactorily. Had you written any letters, for instance—strike that. Had you told Mr. Hawkins that, as the corporation's labor relations adviser, they could hire whomsoever they wished, irrespective of whether they belonged to a trade union? A. Surely I did.

Q. When did you so advise him?

A. Oh, that was——

Q. Before the sale was made from the Juneau Lumber to the Juneau Spruce?

A. No; it was along in July or August.

Q. Of 1947? [239]

A. Sometime when he was down to the States.

Q. In 1947? A. Yes, sir.

Q. You, of course, knew that he was Vice President of the Company and General Manager up here?

A. Yes, sir.

Q. All right. And when the longshoremen spoke to you they asked for the work that longshoremen traditionally do, didn't they?

A. I don't know why they asked for it. They simply asked us to sign a contract.

Q. Did they say they wanted to do that work,

(Testimony of Eugene H. Card.)

they wanted to do what is usually referred to as longshoremen's work?

A. I have repeated the conversation that took place just as nearly as I can. I can't recall it word for word a year and a half later. I am sure they didn't say anything about "traditionally longshore work." Mr. Ford merely said he wanted us to——

Q. To buy popcorn, or to do longshore work?

A. You will have to ask him.

Q. Didn't you ask them what they were there for, what work they wanted to do? A. No.

Q. In other words, these men came to talk to you, and you didn't know if it was a contract to sell popcorn or do [240] longshore work?

A. He said they wanted us to sign a contract with the Longshore Local. I asked if they represented any of the plant and he said "No," and I said we would not, could not sign a contract with his union.

Q. You knew at that time, didn't you, Mr. Card, that the men were hired by the Juneau Lumber as well as the Juneau Spruce when it was necessary to do longshore work, and they were not regularly on the pay roll; you knew that?

A. I didn't know the Juneau Lumber Mills ever hired men for longshore work such as you refer to.

Q. Did you make any inquiries as to the past practice? A. I did not.

Q. Did you ever read the contract that had been in effect between the Juneau Lumber and the Juneau longshoremen?

(Testimony of Eugene H. Card.)

A. I have never seen it, if one exists.

Q. Was it ever explained to you? A. No.

Q. As labor relations adviser for Juneau Spruce, do you know or were you consulted by them before they took over from the Juneau Lumber?

A. I was.

Q. Did you ask what contracts were in effect?

A. Yes.

Q. Labor relations contracts? [241]

A. I asked if there were any labor contracts.

Q. Of whom did you make that inquiry?

A. Mr. Dashney.

Q. Who is Mr. Dashney?

A. Auditor of the Coos Bay Lumber Company and the man who came up to make the purchase agreement.

Q. Did you ask if they had any longshoremen regularly in their employ? A. No.

Q. Weren't you concerned with it? A. No.

Q. As labor relations man advising a large corporation, weren't you interested in ascertaining their policy, whether or not longshoremen were hired?

A. I knew nothing of the so-called policy of hiring longshoremen.

Q. We will say "intermittently" to do longshore work there? A. No.

Q. You made no inquiry at all? Haven't you had any interest?

A. Surely, I had an interest in anything involv-

(Testimony of Eugene H. Card.)

ing labor relations. I asked Mr. Dashney when he asked me to advise him as to how this purchase should be handled from the labor end of it, I asked if there were any union agreements in effect to his knowledge.

Q. How many were you told there were, [242] if any? A. One.

Q. By the way, how long have you been with the Coos Bay Lumber Company?

A. Since April 1, 1946.

Q. You have had a lot of experience around lumber mills, I assume?

A. Since September, 1921.

Q. You knew in this operation here that long-shoremen would be employed from time to time?

A. No, I didn't.

Q. You had no knowledge of that? A. No.

Q. You made no inquiries at all as labor relations man?

Mr. Banfield: What date? At the time he arrived, or the Company took over, or what?

Mr. Andersen: I think the witness understands me.

Mr. Banfield: I don't understand you and should like to know.

Q. Do you understand me, sir?

A. Are you talking about——

Q. At the date of the change-over from the Juneau Lumber to the Juneau Spruce?

A. I asked if there were any labor contracts. I

(Testimony of Eugene H. Card.)

was told there was one. That was all the interest I had.

Q. That one was with whom? [243]

A. I.W.A. M-271.

Q. Weren't you told there was a contract between the Juneau Lumber and the Longshore Union here? A. I was not.

Q. Did you make any inquiry as to whether longshoremen were used in that operation? A. No.

Q. Did you make any inquiry as to what labor was employed from time to time?

A. I never talked to the employees of the Juneau Lumber Mills about anything.

Q. Getting down to the picketing there and so forth, as I understand it, when it came on, on the 13th, the mill was closed? A. Yes, it was.

Q. And you, of course, came up for that purpose; you didn't come up for the trip, did you?

A. I came up at the request of Mr. Hawkins.

Q. To try to iron this thing out if you could?

A. Yes.

Q. Did you, with respect to the amount of longshore work that was done here, did you make any inquiries as to what percentage of the longshore work was done in relation to the total labor or payroll of the company? Did you make any inquiry?

A. No.

Q. Didn't you try to determine whether the longshore operation was a major portion of the labor expense, or whether it was a minute portion of the

(Testimony of Eugene H. Card.)

labor expense of the Company? A. No.

Q. You weren't interested in that?

A. No, sir.

Q. Did you inquire into what would be the average monthly money expended by the Company for longshore work?

A. It would be pretty hard to say what was spent when they didn't spend any.

Q. I asked, did you inquire?

A. I didn't inquire.

Q. Did you ask anybody in the Company or the Longshore Local about how many men there were on the average for the Company, directly or indirectly, for other people, as has been testified, over, say a period of six months? A. No, sir.

Q. You weren't interested in those figures?

A. No.

Q. Whether they were great or large?

A. I was only interested in whether they had the right to try to force us to hire them.

Q. You weren't interested in whether the Company closed down, [245] you say?

A. I said——

Mr. Andersen: Somebody is mistaken. Will you read the witness's answer? A. It could be you.

Q. I said "somebody is mistaken." I have been mistaken many times.

Court Reporter: "I was only interested in whether they had the right to try to force us to hire them."

(Testimony of Eugene H. Card.)

Q. Is that your answer, sir?

A. If that is what I said.

Q. Then you weren't interested at all in whether the mill closed down? A. Yes.

Q. I asked you about employing them and also if you were interested in whether or not the mill closed down?

A. I was interested in the fact that the mill closed down.

Q. And wanted to get it over?

A. If possible; yes, sir.

Q. Now on the technique of labor relations, tell me what facts are usually considered as most important.

A. Personally, I consider the first factor staying within the law, advising my Company properly within the law.

Q. What law do you refer to, if any?

A. Of course, that takes in all Federal laws.

Q. You don't advise people regarding the law?

A. No.

Q. You are not lawyer?

A. No; thank goodness.

Q. Do you advise regarding labor law?

A. Yes.

Q. What law do you have in mind?

A. The National Labor-Management Relations Act; the Fair Labor Standard Act, as it might apply. Those are the principal laws affecting labor relations.

(Testimony of Eugene H. Card.)

Q. The Fair Labor Standards Act is not involved here. A. No.

Q. Do you concede any laws are involved in this dispute?

The Court: We are wandering far afield. We are not interested in the conception of this witness of the law.

Mr. Andersen: You might be right, your Honor.

Q. Tell me the proper technique of advising people in this sort of a situation.

A. I also try very hard to get along with people employed by the Company, in other words, I feel it is my job to sit down and talk things over and keep things straightened out.

Q. Amicably? A. Yes.

Q. What else?

A. Principally, not to give away too much from the Company's [247] standpoint and not to be unfair to the people on the other side and at the same time try to balance the scales between the two. Primarily, I am employed by the Company.

Q. Does that complete it?

A. I think that will cover the main objectives; yes, sir.

Q. Do I understand it was you who advised the Company not to enter into contractual relations with the longshoremen? A. Yes, that is right.

Q. When did you advise them that, sir?

A. Starting October 23, 1947.

Q. October 23 of 1947? A. Yes, sir.

(Testimony of Eugene H. Card.)

Q. At that time and when you were in that meeting with Mr. Hawkins or any time after that, did you ever ask Mr. Hawkins how many longshoremen or how much money would be involved in so far as the Company was concerned, if they signed that contract with the longshoremen and if it didn't make any difference with the I.W.A.? Did you ask any question like that?

A. It was discussed to some extent; yes.

Q. Did he tell you how much the payroll would be, or how many longshoremen?

A. What longshore work are you talking about?

Q. Longshore work done at the expense of the Company, absorbed [248] by the Company, done by men employed by the Company, rebilled to commercial steamships—either, both, or separately, I don't care.

A. Of course. I am not trying to evade your questions. I will try to give this as clear as I can. The loading of commercial steamships—we have nothing to do with that.

Q. That is true.

A. There were some cannery tenders that were loaded by the longshoremen. These men were paid by the Company and charged on the invoice to the people who bought the boxes or the lumber. They probably amounted to several hundred dollars between the first of May and the 23rd of October of 1947, then, of course, that was all the longshore work that had been done.

(Testimony of Eugene H. Card.)

Q. You would say, in a year's period, if that is the criterion, perhaps there wouldn't be \$3,000 of longshore work by the Company and the cost assumed by them, is that correct?

A. Cost assumed by the Company?

Q. Yes.

A. It would be kind of hard to figure out. We didn't know how much——

Q. Do you think it would go as high as \$10,000?

A. I doubt it very much.

Q. You doubt it would be as much as \$10,000?

A. I doubt it.

Q. As a matter of fact, you don't believe it would be \$5,000?

A. Between \$5,000 and \$10,000, if you are talking about barge loading.

Q. We will take that figure. What is the total payroll? You have roughly 220 employees at Juneau, better than 50 in the sawmills someplace else and lumber yards in Ketchikan on the payrolls, the office force, President's salary; what is the total payroll?

A. You would have to ask somebody else.

Q. Don't you know the total? Aren't you the Personnel Director?

A. I am not the Personnel Director of the Juneau Spruce Corporation.

Q. Have you any idea of the total yearly payroll of the Company?

A. I understand that at the time they were in

(Testimony of Eugene H. Card.)

operation it was running somewhat better than \$100,000 a month.

Q. \$100,000 a month? A. Yes.

Q. And the total payroll of the longshoremen would be between \$5,000 and \$10,000 a year, is that correct? You have just testified, of course, that is only representative. A. Yes.

Q. With those facts in mind, on about the 13th, after you had [250] these facts and figures in mind, on April the 13th, you still advised the Company not to hire any longshoremen?

A. I advised the Company not to sign a contract with the local longshoremen, that is right.

Q. All right, sir.

Mr. Andersen: That is all.

Redirect Examination

By Mr. Banfield:

Q. Mr. Card, you examined over the objection of hearsay, as to what Mr. Peterson and Mr. Gustafson told you when you arrived back here in April, 1948. Just exactly what did they tell you?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial, may it please the Court.

The Court: However, it was gone into on cross-examination. It may be gone into on redirect examination. That is not merely for the purpose of repetition, but to bring out something that was not brought out.

Q. What was the attitude of Mr. Peterson and Mr. Gustafson?

(Testimony of Eugene H. Card.)

Mr. Andersen: I object to that as incompetent and immaterial. He asked what was said.

Q. What did they say?

A. They said jointly, between the two of them—I can't say exactly, but between the two of them, that they were given [251] to understand by the longshoremen who attended their meeting that there was a contract in effect between the Juneau Spruce Corporation and the Longshore Local and that that contract covered the work of loading the barges at the plant, and they felt that they would have to give up that work, which the I.W.A. had been doing, and turn it back to the longshoremen in view of that contract. I told them there was no such contract in effect. We had never signed a contract with the longshoremen and somebody had been kidding them along a little bit, in my opinion.

Q. Did you talk to any other officials of the I.W.A., committee members?

A. Not at that time.

Q. Did you before the mill re-opened July 19?

A. Yes.

Q. What did they say?

Mr. Andersen: To which I object as hearsay, may it please the Court.

The Court: Is this going into something other than——

Mr. Banfield: It is for the purpose, if the Court please, of determining the attitude of the I.W.A. Counsel started in here with testimony as to why

(Testimony of Eugene H. Card.)

the I.W.A. did this and why the I.W.A. did that and “didn’t you know what happened at their meetings?” [252]

The Court: I understand all that.

Mr. Banfield: I want to know what the attitude was of the whole Union.

The Court: Is this by a conversation brought out by counsel on cross-examination?

Mr. Banfield: No, he didn’t talk about a specific conversation at all. He just said “in conferences with the I.W.A. officials.” That is what the subject was.

Mr. Andersen: I don’t believe that is a correct statement of the record, may it please the Court.

The Court: All I am trying to do is conform with the rule, where one side brings out discussion or conversation the other may bring out the rest of it, if there is any. If the purpose is to merely bring out something not sufficiently brought out——

Mr. Banfield: If the Court please, I am now talking about also what Mr. Roden brought out, as well as what Mr. Andersen brought out, redirect examination on the whole cross-examination, including who told what in different meetings Mr. Roden pointed out that he was getting at what was the position of the I.W.A. “as told to you by various persons.” Now I am trying to find out exactly. I think there is more to be said.

The Court: The Court is not particularly interested in what you are trying to bring out so long as it is within [253] the rule.

(Testimony of Eugene H. Card.)

Mr. Banfield: I am well within the rule, your Honor.

The Court: You may proceed.

A. Where were we?

Q. We were discussing what the I.W.A. men told you at various meetings and what their attitudes were.

A. The first story I got was they had had a couple of meetings when longshoremen's representatives attended their meetings and they didn't know exactly what the score was and were afraid if they didn't give up this work the mill was going to be shut down.

Mr. Andersen: I move this be stricken as hearsay.

The Court: Objection overruled.

Mr. Andersen: I would like to interpose my other objection to this witness's testimony so far as the International is concerned.

The Court: It is admitted subject to the objection.

Q. Go ahead.

A. The plant was just getting ready to start the season's operation after being down a couple of months. They wanted work and were afraid they would lose the work. They knew they would lose work if the plant were shut down by the picket line and they thought the best thing, if there was going to be work, was to give the work up [254] of loading the barges and avoid any trouble.

(Testimony of Eugene H. Card.)

Q. Go ahead.

A. And they also said that they didn't know just what the situation was. During the winter shut-down the local I.W.A. officers they had prior to the time of the shut-down had left town or something, and they had got through the winter without officers and were just getting started again and didn't even have a President at the time this got started. The two they had, Mr. Peterson and Mr. Gustafson, were uncertain as to what to do so they thought the thing to do was give up the work, knowing there would be a picket line if they didn't and try to keep the mill in operation.

Q. Did they say anything about what effect there would be if they went through a picket line?

Mr. Andersen: I object to that as incompetent, irrelevant, immaterial and no foundation laid, may it please the Court.

The Court: Objection overruled.

A. No, I don't recall them saying anything to me about what might result to them if they went through a picket line.

Q. Was there anything said about their position under the Labor-Management Relations Act, I mean the Taft-Hartley law? Did they discuss that with you?

A. No, I don't recall that they ever did.

Mr. Banfield: If the Court please, there is one more subject entirely foreign to anything testified to today. I would like the privilege of recalling him.

The Court: You may.

Mr. Banfield: That is all. You may cross-examine.

Mr. Andersen: No further questions.

(Witness excused.)

The Court: Well, ladies and gentlemen of the jury, remember the admonition heretofore given you to refrain from discussing or talking about this case and from reading newspaper or other accounts of this or connected cases or matters. In other words, remaining aloof from anything that might influence you in this case.

Whereupon the Court adjourned until ten o'clock a.m. May 3, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

GLEN KIRKHAM

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Will you state your name please?

A. Glen J. Kirkham.

Q. Mr. Kirkham, have you been in the employ of the Juneau [256] Spruce Corporation.

A. I have

Q. During what period of time?

A. For the last three years.

(Testimony of Glen Kirkham.)

Q. Have you ever belonged to any unions?

A. Yes; I belonged to the Millworkers' Union.

Q. What is the official name of the local union you belonged to?

A. I can't tell the right name, but I think 207 or something like that.

Q. Is that the International Woodworkers?

A. International Woodworkers.

Q. And is the number M-271?

A. M-271 I believe is the number.

Q. Have you ever been an officer of that Union?

A. I was President of that Union.

Q. During what period of time?

A. In about 1947.

Q. When did you cease to be President?

A. In the fall, I believe, of 1948.

Q. Were you the President of the Union on November 3, 1947? A. Yes.

Q. And how long had you been President of the Union prior to that time?

A. I don't just remember, but it had been close to a year. [257]

Q. Mr. Kirkham, did you as President of the Union in the summer of 1947 have any occasion to meet with representatives of the International Longshoremen's and Warehousemen's Union, Local 16?

A. No, we had no occasions to meet with them. They met with us once but it was just a formal meeting.

Q. Did they request the meeting or did you?

(Testimony of Glen Kirkham.)

A. No; they requested it.

Q. Where was the meeting held?

A. It was held in the C.I.O. Hall.

Q. Do you remember about when that was?

A. Let's see, it was sometime in the fall of the year. I don't just remember just when.

Q. Was it before the contract of November 3, 1947, was signed?

A. Yes, it was before that.

Q. And who was present at that meeting?

A. You mean the officers?

Q. Name the persons that were present.

A. That would be pretty hard to do at that particular time. There were quite a few there that night I could name.

Q. Name the I.W.A. men that you can remember.

A. Nels Lee, Vice President; Tim O'Day was Secretary, and I can't think of the other fellow's name that worked on the log boom. He was Secretary-Treasurer. [258]

Q. Were there other members of the I.W.A., that is, general members?

A. Yes, a good many members.

Q. It was a meeting of the Union itself?

A. Yes.

Q. Who was there representing the longshoremen?

A. Mr. McCammon, Mr. Ford—they were the principal talkers. There were others who didn't talk.

(Testimony of Glen Kirkham.)

Q. What transpired at that meeting?

A. At that particular time they asked us to turn the loading of scows and barges over to them. In fact, as Mr. Ford or Mr. Cammon stated—I don't remember which it was—they wanted everything from the time the lumber was set down in the yard until well, from then on to the boats, to the scows.

Q. Did they want to do the work of bringing it up to the bull rail of the dock?

A. Well, he talked of wanting it turned over to them. He said they would do much more for us than what we were getting at the time, if we turned it over.

Q. What did he mean, "turn over"?

A. From where it was set down in our yard, let them handle it from there on to the boats.

Q. And did they want to stow it on the boats and barges too? A. Yes. [259]

Q. What did they mean, "give you more than what you were getting"?

A. That wages would be boosted.

Q. Did they imply that would be under their jurisdiction and control? A. I don't know.

Mr. Andersen: Just a minute. I object. It calls for conclusion.

Q. What was the understanding?

Mr. Andersen: I object on the ground that he should state what was said.

The Court: I think before he can say what the

(Testimony of Glen Kirkham.)

understanding was he would have to say what was said. An understanding differs radically from——

Q. What did they say?

A. The only thing he said that I can remember is that if we would turn it over to them that they would see that we would get a higher wage rate and then also it was stated their Union was strong and our Union was weak.

Q. And what was agreed by the I.W.A. Union?

A. Well, at our meeting——

Mr. Andersen: Same objection, may it please the Court. I will object on the ground that the witness should state what was said rather than what was agreed.

Mr. Banfield: If the Court please, a great many men [260] were there. Naturally he couldn't testify everything that was said at the meeting that night.

The Court: If he can state what resulted he can state what it was based on and he ought to state what it was based on. The understanding otherwise, or the statement of the understanding, is challenged as a conclusion.

Q. Mr. Kirkham, what was said with respect to the I.W.A. position in regard to this proposal?

A. You mean after they left?

Q. What was determined, in their presence or after?

A. There was no agreement in their presence. They asked for a vote. We didn't give a vote. We waited until after they left. The boys talked it over

(Testimony of Glen Kirkham.)

for a while and came to the conclusion they couldn't accept the longshoremen's proposition because it, well, it conflicted in our work down there considerably and it was understood that we wouldn't touch a thing that had ship's gear on it.

Q. You agreed that the I.W.A. would not do any work of handling when the tackle was attached to the ship's gear? A. That is right.

Q. If the loading was being done by a commercial steamer, what did you decide to do about it?

A. We decided not to touch commercial steamers.

Q. You mean after it was attached to ship's gear?

A. We would pull the stuff to the bullrail and from there on [261] the longshoremen would take over.

Q. What was the situation with regard to outsiders, as the cannery tenders that would come in for box shooks what was the understanding?

A. On that I don't think we had much understanding, as to box shooks and sometimes they loaded them, it depended—during that time labor was very scarce and there were several times Raatikinen from out here came in and sometimes they loaded and sometimes we loaded.

Q. Was any lumber loaded out on small boats and barges?

A. Company boats, and if someone came in and wanted a small stack of lumber we would. I wasn't President of the Union at that time. Mr. Turner was.

(Testimony of Glen Kirkham.)

Q. That had been the practice for sometime?

A. That had been the practice for some time when I went there.

Q. After this decision by the Union, was that decision conveyed to the longshoremen?

A. Yes; by letter.

Q. By letter? A. By letter.

Q. What work were you willing to have the longshoremen do?

A. We was willing to have them load any ship that came in and that had its own gear on it. We would haul it to the bullrail and they would take over from there.

Q. Mr. Kirkham, were you President of the Union on October [262] 23, 1947?

A. Yes, I believe so.

Q. Did you meet Mr. Card about that time?

A. Yes, along in there sometime.

Q. Tell me when you first met with Mr. Card and where and who was present.

A. The first time I met Mr. Card was in the greenroom down there, and when he came in he just came in and introduced himself and told me who he was and asked for a meeting with our Committee over in the office and we met over there that evening. We were getting up a contract at this time. Our contract was practically all ready only we didn't understand how to write it up and we didn't know how to get it in there and we sent it to the International in Portland to work on. Finally they wrote us one and sent it back up to us.

(Testimony of Glen Kirkham.)

Q. Was the first written draft of the contract or the first written proposal typed out, prepared by you or your Union or Mr. Card or by whom?

A. By our Union, the first one.

Q. You say you had a meeting? A. Yes.

Q. Could that have been about October 25?

A. I can't remember the date; along there sometime.

Q. Did you discuss that contract at that meeting? [263] A. Oh, yes.

Q. What was discussed in particular with regard to the contract?

Mr. Andersen: I object to all this as hearsay.

A. I don't remember.

Q. What was said by Mr. Card and what was said by you?

Mr. Andersen: Same objection.

A. It is pretty hard to remember those things. I haven't seen the contract since, you know.

Q. I hand you here Plaintiff's Exhibit No. 2 which is in evidence as the agreement dated November 3, 1947, and ask you if you recognize that contract.

A. Yes; I remember this one. I remember it well.

Q. Now, Mr. Kirkham, I direct your attention to the Union recognition clause of the contract which is on the first page of the contract and ask you to read that paragraph for your own information.

(Testimony of Glen Kirkham.)

A. Yes; that is what we had put in it.

Q. Now, Mr. Kirkham, was anything said with relation to this paragraph at this meeting of October 25 regarding the work of loading barges?

Mr. Andersen: To which I will object as incompetent, irrelevant and immaterial and hearsay, may it please the Court.

The Court: Objection overruled.

Q. Go ahead and answer. [264]

A. Well, there were, but we couldn't give them any answer at that time because we never made a move without we went through the International down in Oregon, in Portland.

Q. What did they want that you had to refer to the International?

Mr. Andersen: I object as calling for a conclusion of the witness.

The Court: If he knows he may answer.

A. I didn't understand your question.

Q. What did the Company, the Juneau Spruce Corporation, ask for with regard to this paragraph?

A. They didn't ask us for anything on that particular paragraph.

Q. Did they ask you anything about barge loading?

A. Not at that time. This all came up later on. Mr. Card missed that in a way, too, about scows and barges. I told him I could not give any answer until I got word from headquarters below.

Q. What I wanted to know was what Mr. Card

(Testimony of Glen Kirkham.)

said or asked you about the barges and scows?

A. He just asked us if we would load them.

Q. Did you make any inquiry from the International? A. Yes.

Q. What International was that?

A. International headquarters there in Portland. It is the head of [265] our Local here, the International Woodworkers of America.

Q. Did you get an answer back from that office?

A. We did. We wired and got an answer back.

Q. After you got an answer back, what did you inform them?

A. Our answer, we got back——

Mr. Andersen: May I interrupt and ask as to the date of this and for a proper foundation for it?

Q. All right. After you got an answer back, Mr. Kirkham, did you have another meeting with Mr. Card? A. Yes.

Q. Was Mr. Hawkins present? A. Yes.

Q. Was your Committee present? A. Yes.

Q. And where was it?

A. Down in the mill office.

Q. And about how long was this after October 25?

A. I don't remember that. It seems like it was the last day Mr. Card was here.

Q. Was it before the contract was signed?

A. No, I think this came in after the contract was signed. I am not quite sure. It has been quite a long time ago.

(Testimony of Glen Kirkham.)

Q. Do you remember having two meetings with Mr. Card? A. Yes.

Q. And do you remember that they were with your full Committee [266] and do you remember that Mr. Card finally had this agreement typed up for you after everything? A. Yes.

Q. Was this before the typing of the contract or was it afterwards?

A. That was after the typing of the contract, I am quite sure.

Q. Was it after the contract was signed on November 3? A. It seemed like it was after.

Q. How long was it before you got an answer from the International?

A. I believe the following day.

Q. You had the first meeting right after Mr. Card arrived, about October 25? A. Yes.

Q. Did you send the wire right away?

A. No, a few days later.

Q. Then you got an answer back right away?

A. Yes. We had called several meetings at that time over the contract during the time we sent this wire, during the time we were holding these meetings.

Q. Mr. Kirkham, if I showed you copies of those wires, would you recognize them?

A. I presume I would.

Mr. Banfield: If the Court please, it will be just [267] a moment until I get the wires. If the Court please, the copies of the telegrams I have

(Testimony of Glen Kirkham.)

asked for will be produced by another witness I have called for ten-thirty, so I don't have them at this time.

Q. Mr. Kirkham, was it agreed, or tell me this, what did the I.W.A. promise the Company with regard to the loading of these barges?

A. We promised them that we would load them.

Q. Was the agreement made on that basis?

A. A verbal agreement was made on that basis at that time. I can't remember that it was a written agreement at that time, but it was verbal to go ahead and load them after the wire came from headquarters.

Q. Was there any discussion at that time what work——

Mr. Andersen: I move that be stricken. He seems to be trying the case of the Juneau Spruce Corporation vs. the I.W.A. and now counsel has introduced a contract Exhibit 2 and now he is attempting to vary the terms of the contract by parol evidence. I think it is improper and I don't believe he has the right to impeach his other witnesses or the document and I submit it is hearsay and calling for the conclusion and impression of the witness and——

Mr. Banfield: If the Court please, he is assuming something the witness is not going to testify at all. Our purpose in doing this is to show under what conditions and [268] circumstances the contract was made. This is not an adversary proceeding between

(Testimony of Glen Kirkham.)

the I.W.A. and plaintiff in this case. It is an agreement made between two parties and not parties to this suit, not identical parties to this suit. I have the right to show what the contract is and how it operated afterwards.

The Court: Would it show any more if his testimony goes in, anything more than what is already embodied in the contract?

Mr. Banfield: We don't think it would, other than explaining the terms, what is meant in the industry, the phraseology.

Mr. Andersen: The contract speaks for itself, unless there are technical words that require explanation or latent ambiguities, there is no room for explanation or need therefor.

The Court: That is the way it strikes me. Unless you can point to something specific in the contract which you wish to explain or illustrate—

Mr. Strayer: May I say one thing? We think the contract covers work that was talked about, but the defendants claim it did not or it was not intended to cover barge loading. It becomes important to show that both parties intended and interpreted it as barge loading.

The Court: To show how the parties interpreted it? [269]

Mr. Strayer: Yes.

The Court: You may proceed.

Mr. Roden: That can only be shown by actions on the part of the different parties, how they in-

(Testimony of Glen Kirkham.)

terpreted the contract. The interpretation of the contract was completed when it was signed. All negotiations, understanding, talks about it became merged in the contract and there is no reason now why the terms of the contract should be changed. It is not ambiguous. It is fully understood. It is in plain English language. One Union understands as well as the other. The very most that can be claimed now is what they have done under it, but they want to tell you what the contract means.

Mr. Strayer: No distinction can be shown between acts and conversations of the parties. What they said was a verbal act showing the interpretation of the contract.

The Court: I was going to add that since the parties' acts showing their understanding or interpretation of the contract would be competent, then likewise the antecedent interpretations placed on it not by acts but what they said would likewise be competent, I should think. You may proceed.

Q. Mr. Kirkham, do you remember any conversation at the meetings between the I.W.A. and the Juneau Spruce Corporation representatives in October of 1947 as to how this paragraph should be worded and as to what it should include?

Mr. Andersen: May I have a better foundation as to [270] place and persons present, your Honor?

The Court: Yes, I think it should specify those circumstances.

Mr. Banfield: If the Court please, I believe that

(Testimony of Glen Kirkham.)

the witness already testified that the meetings were in the office of the Company and both meetings had the same persons present. I will be glad to go over it again.

Q. Mr. Kirkham, tell us where the first meeting was with the Company?

A. Down in the Company office.

Q. Was there a subsequent meeting?

A. There were.

Q. And where was it?

A. In the office down below, or at the Juneau Spruce.

Q. Who was present at the first meeting representing the Company?

A. Mr. Hawkins, Mr. Card, and it seemed to me like Stan Johnson was there. I am not too sure about that, but it seemed like he were.

Q. Who was present for the Company at the second meeting? A. The same ones.

Q. Who was present for the I.W.A. at the first meeting?

A. There was Nels Lee, Tim O'Day——

The Court: I think all that has been gone into. Counsel's objection was that you didn't fix the time and [271] place of this particular interpretation that you are seeking to bring out that was placed on the contract.

Mr. Andersen: Correct, your Honor. I thought he said it was October 29 he had this discussion. I want to make certain and to learn who was present there.

(Testimony of Glen Kirkham.)

Q. Go ahead and tell who was present at the second meeting.

Mr. Andersen: Is that the meeting of October 29?

Mr. Banfield: The witness said he was not certain of the dates of the meetings, but there were two between October 23 and the date it was signed.

Mr. Andersen: I would like to know if it was at the second meeting.

Mr. Banfield: Yes, that is right.

Q. Did you discuss the paragraph at the first or second meeting or both of them?

A. Both of them.

Q. At the second meeting, what was said regarding the Union recognition clause which in this contract states——

Mr. Andersen: I object. I assume——

Q. "The Union is hereby recognized as the sole and exclusive bargaining agent for all the employees of the Employer in its sawmill, manufacturing and retail departments at Juneau, Alaska."

A. Yes.

Q. What was said at the first meeting and by whom, regarding [272] that provision?

A. On that particular clause, I don't know that there was any particular discussion on it. We was all satisfied with it.

Q. Was there any discussion regarding it at the second meeting?

A. You mean the sole bargaining agent of our Union?

(Testimony of Glen Kirkham.)

Q. Yes. A. No, we were both satisfied.

Q. Was there any discussion at any meeting?

A. At our main meeting up in the Hall.

Mr. Andersen: Just a minute. That is not responsive.

Mr. Banfield: The answer may be stricken.

Q. Mr. Kirkham, with respect to these two meetings, was there anything said as to what specific jobs should be covered by this phase "all employees of the Employer at Juneau, Alaska"?

Mr. Andersen: I think I will object. The witness said nothing was said about it at all.

Mr. Banfield: He said nothing was said about the exclusive bargaining agent. It was agreed to. I am asking if anything was said with relation to this phrase as to what work it would cover.

The Court: Objection overruled.

Q. You may answer that.

A. Our agreement, our talk we had up there, we said that we [273] would load the scows and barges, that everything where we used our own equipment, that we would load, if I understand your question right. That is what came in there. We also stated at that time, which I don't believe was in any contract, that we wouldn't touch anything that came in there which had ship's gear on.

Q. That part "ship's gear on," that was not mentioned?

A. That is right. We wanted to be the sole bargaining agent for that Company. That was one of the main reasons in there.

(Testimony of Glen Kirkham.)

Q. Did the I.W.A. insist on that provision?

A. We did, up here in the meeting.

Q. Was that fact known by the Company?

A. I don't know. I couldn't tell you whether it was or not, but anyway that is what we wanted.

Mr. Banfield: If the Court please, we will produce a witness here to show that he is unable to find these wires in the file of the I.W.A. by the man who has charge of them. We have a right to show what was in this wire that was returned from the International by this witness. If the Court please, the copy of that wire or, no, I think it was a letter—Mr. Strayer says he is quite sure a copy of that wire was furnished to Local 16. They may have it.

The Court: Hasn't he already testified to the contents of that wire? [274]

Mr. Banfield: No; I didn't put that in.

Mr. Andersen: That is true, your Honor.

Q. Mr. Kirkham, do you have any copies of these wires? A. No, I haven't.

Q. Do you know where they would be?

A. They are supposed to be in the records of the Union at the Hall. Shortly after that wire came I was put on a different job here. I couldn't belong to the Union any more. I read the wire and I believe it was put in the—I believe the Secretary had it in his book up there.

Q. Was that wire used at any other time here in Juneau, do you know?

(Testimony of Glen Kirkham.)

A. I am not sure, but it seems to me like it were.

Mr. Andersen: I move that be stricken as a conclusion of the witness.

The Court: Motion denied.

Q. Mr. Kirkham, do you know the contents of the wire returned from the international?

A. I couldn't quote it, but the wire stated for us to go ahead as we had been doing before and also said that if any trouble started that they would be up immediately.

Mr. Andersen: Same objection, I assume, as to all this line of questioning?

The Court: What objection is that?

Mr. Andersen: Incompetent, irrelevant and immaterial. [275]

The Court: It seems to me that before the witness is questioned as to the contents of the reply or answer that perhaps the telegram that elicited or asked for this advice should be put in.

Mr. Banfield: That is another thing that we can't find at this time.

The Court: Then his testimony first should be why that was sent to headquarters.

Q. Did you send a wire to headquarters yourself? A. No, the Secretary.

Q. Did you see it? A. I saw a copy of it.

Q. What was in that?

A. Asking for a decision of this loading of scows and barges and explained to them just what our stand was up here and we got the answer back immediately and they told us which way to go.

(Testimony of Glen Kirkham.)

The Court: Was anything said in that telegram as to the claims of Local 16?

A. No.

Mr. Andersen: I beg your pardon. I didn't hear the last answer.

The Court: No.

Q. Mr. Kirkham, you mentioned here what was voted on by the Union prior to this agreement. You stated the Union voted [276] not to handle anything while it was attached to the gear of a ship. Whose ships would that be?

A. That would mean commercial ships.

Q. And what if you were using Company gear?

A. I don't think we discussed that.

Q. Did the Union decide on what work it would do and what work it would not do?

A. We decided to load scows and barges but anything that came in here with ship's gear on it, that is also Government ships, we wouldn't touch it, just take the stuff to the bullrail. That is the agreement we made.

Q. How about Company-owned vessels?

A. We loaded them right along. Nothing was said about that.

Q. Had it been your practice? A. Yes.

Mr. Banfield: You may cross-examine.

Cross-Examination

By Mr. Andersen:

Q. During this period of time there were quite

(Testimony of Glen Kirkham.)

a few meetings between the Union and the Company?

A. Only two or three meetings, only to straighten out our contract, that is all they were for.

Q. In other words, you were trying to negotiate a contract with them? [277] A. Yes.

Q. Finally on November 3 you entered into an agreement with them? A. Yes.

Q. And this is it, this contract dated November 3? A. That is the contract we agreed on.

Q. On November 3? A. Yes.

Q. This was your first contract with the Company, wasn't it? A. I beg your pardon?

Q. Was this your first contract with the Company?

A. No, we had contracts before that. That is the first one I had anything to do with.

Q. Do you know if the I.W.A. had any other contracts with the Spruce Corporation?

A. Sure they had. I don't know whether they were with the Spruce or not.

Q. You mean with the Juneau Lumber Company?

A. Yes, and I think we were running on that until this was written up.

Q. In other words, the Juneau Lumber Company had a contract with the I.W.A. and from the time the Juneau Spruce took over from the Juneau Lumber you kept on under the same contract?

A. Under the same contract. [278]

(Testimony of Glen Kirkham.)

Q. And were paid the same wages?

A. Yes.

Q. And had the same working conditions?

A. Yes.

Q. And the same seniority? A. Yes.

Q. And they recognized the I.W.A. as bargaining agent, just as it was with the Juneau Lumber Company; is that correct?

A. Well, I don't know. I didn't have any dealings with them at all until this contract was written up.

Q. And signed? A. Yes.

Q. But during the intervening period from the time the Juneau Spruce took over from the time the Juneau Lumber sold—strike that. From the time the Juneau Lumber sold to the Juneau Spruce Company, and until this contract, Plaintiff's Exhibit No. 2, was written up, your wages were the same as they had always been?

A. No; I got a raise.

Q. You got a raise. Were your working conditions the same? A. The same.

Q. And you settled grievances the same as always?

A. If there was any grievance; I don't remember any.

Q. And operations were the same as for Juneau Lumber; isn't that true? [279]

A. I guess it is.

Q. All you fellows felt, and the Union felt, that

(Testimony of Glen Kirkham.)

the contract of the Juneau Lumber had carried on?

Mr. Strayer: I object to that.

Mr. Andersen: This is cross-examination.

The Court: What is the question?

Court Reporter: "All you fellows felt, and the Union felt, that the contract of the Juneau Lumber had carried on?"

Q. Right over to Juneau Spruce, and you worked under the same conditions; isn't that true?

A. Hardly true.

Mr. Strayer: I object to the questioning along this line, your Honor. It isn't material what this witness or others may have felt. It is a legal situation of carrying over these other contracts.

The Court: It is true he is being asked here to state what he believed was the agreement.

Mr. Andersen: Supposing I withdraw the question, your Honor.

The Court: And what or how the rest of the members felt about it, for whom I imagine he could not speak.

Mr. Andersen: I will withdraw the question.

A. I could answer.

Q. Suppose you answer my questions. We will get along a lot better if you just answer my questions, as I said. [280] You were the President of the I.W.A. Local here in 1947, correct?

A. Corect.

Q. Did you occupy that position in the Local in 1946? A. No, I was just a member.

(Testimony of Glen Kirkham.)

Q. You only occupied that position one year, in 1947? A. I don't remember the dates.

Q. Do you remember the year you were President? A. 1947.

Q. Is that the only year you occupied that position in the Local? A. I think that is all.

Q. During 1947, say the first part of 1947, did you have any meetings with the Company at all?

A. In the first part of 1947?

Q. Did you have any labor meetings about anything? A. No.

Q. There were no grievances with the Spruce Company at all? A. No, not at that time.

Q. Did you discuss any wage raises with the Company during the first part of 1947?

A. I don't just remember when the wage raise came in, but when they raised the wages down below we got ten cents an hour up here. The Company gave us that without going to them at all. [281]

Q. As I understand, the old contract with Juneau Lumber Company had such provision in it, that if there was a wage increase given down below it would be automatically given under the old contract.

A. I believe it were, but the old contract was five years old.

Q. It ran from year to year?

A. No, it played out somewhere along the line?

Q. The contract was executed in 1942?

A. Somewhere along there.

Q. Wasn't there a clause that it carried from

(Testimony of Glen Kirkham.)

year to year unless one side gave the other notification of modification or something like that?

A. Something like that.

Q. So the first part of 1947—strike that. Do you recall whether you got your raise before or after May 1 of 1947?

A. No, I don't recall.

Q. Didn't you get it after the first; isn't that correct?

A. I don't remember the dates.

Q. You got it from this new Company, the Spruce Company?

A. Yes, and before that from Rutherford.

Q. You got your raise from the Spruce Company, the ten cent raise you mentioned?

A. I don't remember if it was from the Spruce or Rutherford. I got a raise and a check after Rutherford left. He sent back pay. [282]

Q. After Rutherford sent back pay and after Rutherford left you also got a ten cent raise, does that refresh your memory? After Rutherford left you got back pay?

A. Just as he was leaving here he wrote us out checks for back pay.

Q. When did he leave here?

A. I don't know that either.

Q. Well, it was sometime after he sold to the Spruce Company, didn't he?

A. 1947.

Q. Sometime after June?

A. Chances are it would be.

Q. The same time you got the back pay checks is the same time you got your ten cent raise; isn't that true?

(Testimony of Glen Kirkham.)

A. I don't know whether it is or not. We got wage raises along the line.

Q. When did you get the first one?

A. I can't tell the dates.

Q. How many do you say are "several"—three?

A. There must have been three, two or three.

Q. All in 1947?

A. A five cent raise and a seven and a half cent raise and it seemed like ten cents.

Q. The first raise was in the first part of 1947?

A. Yes; I got all the raises that was coming in 1947. [283]

Q. Did you get a raise around the middle of 1947? A. I don't remember.

Q. And you got your last raise, say, after July of 1947?

A. I don't remember when those raises came.

Q. But after Rutherford left, is that true?

A. I wouldn't say it is.

Q. A few moments ago you said that after Rutherford left you got checks for back pay?

A. What Rutherford gave us—I don't know whether Roy left town but I got a back pay check.

Q. You testified after Roy Rutherford left you got a check for back pay and you also got a raise in wages. Is that true, sir?

A. If I knew the dates I would tell you whether it is true or false.

Q. It was you who said it was after Rutherford left; is that true? A. It might be.

(Testimony of Glen Kirkham.)

Q. Was it after he left that you got a raise in wages also?

A. You ought to have that written down and read it off; maybe. I can't remember the dates.

Q. You were called by Mr. Banfield.

Mr. Strayer: Your Honor, if Mr. Andersen wouldn't confuse the witness by when Mr. Rutherford left, if he would say "after the Juneau Spruce Corporation"— [284]

Mr. Andersen: Suppose I ask my questions in my own way, may it please the Court.

The Court: The witness probably should be told if you don't remember—you are not obliged to know anything you might be asked—if you don't know or don't remember you can say so.

Q. The contract you had with the Juneau Lumber had a clause to the general effect that if there was a raise down below, that is, in other lumber industry in which the I.W.A. was interested, you would get a certain increase over that. Isn't that true? A. I believe it is.

Q. And when that raise was placed below you automatically got your ten cent raise up here; is that true? A. Yes.

Q. And is that after Rutherford left?

A. The ten cent raise?

Q. Yes. A. I don't know.

Q. You had a contract; you got a raise under the contract; isn't that true? A. Yes.

Q. How many meetings did you have with Mr.

(Testimony of Glen Kirkham.)

Card or Mr. Hawkins before the contract was signed? Did I understand you to say two or three meetings? [285]

A. Two, I believe. I think three meetings altogether. I can't remember all those things.

Q. And as I recall, somewhere around the 29th of October your Local had a meeting and you went over the proposed contract and about the 29th of October, and at that time everything was gone over and the Local decided to sign the contract and November 3 you finally agreed to enter into this agreement with the Company?

A. Yes, with the Company.

Q. Did you usually attend all meetings of the Local?

A. I wasn't to all of them; no. I was to most of them.

Q. You know that the question of who should do the longshore work was discussed in your Local?

A. In our Local?

Q. Yes.

A. Yes, it was discussed several times.

Q. And you also discussed the Constitution of the I.W.A., didn't you, that the jurisdiction of lumber workers extends from the stump until it is manufactured into the finished products in the mill?

Mr. Banfield: I object. That was not asked on direct. Mr. Kirkham testified there were two or three meetings with Mr. Card, that is all. If he is going to use him as a direct witness let him call

(Testimony of Glen Kirkham.)

him as his own witness when the time comes. [286]

The Court: But the witness was asked as to the scope of the work done by them and this examination falls within the scope of direct examination. Objection is overruled.

Q. In these meetings you held in your Union, such as on October 29 or any of these meetings when you discussed the question of barges, it was brought out in these meetings under your own Constitution, that is the I.W.A. Constitution, the labor claims or labor jurisdiction of the I.W.A. is from the stump until it is through the mill, that is true, isn't it?

A. Well, I don't know whether it is or not. You take lumber from finished products, you can take it from here down below and re-work it.

Mr. Andersen: I move that be stricken as not responsive.

Q. I asked you if you discussed that in your Union. A. Not to my knowledge.

Q. Don't you recall having any discussion at all?

Mr. Andersen: You have Section 3, I assume? (Addressing counsel for plaintiff.)

Q. Will you read Section 3 there, right opposite my thumbnail?

Mr. Strayer: Will you let me look at it, Mr. Andersen. I haven't seen it. [287]

(Document was shown to counsel for plaintiff.)

Q. I directed your attention to Section 3 of

(Testimony of Glen Kirkham.)

your International Constitution which I will read to you. "This Union shall be International in scope and shall unite into membership all working men and working women who are employed in or around any operation or employment having to do with the processing and handling of wood products at all stages from the stump to the finished product." Now, in your meetings, didn't you discuss that clause at all?

A. We did a few times. I remember it was mentioned a few times.

Q. It was in relation to a discussion around your own Constitution your Union finally passed a motion, wasn't it, that the loading of barges didn't belong to you, that it belonged to the longshoremen?

A. I don't remember anything like that.

Q. Do you know if you were present at a meeting of your Union April 1, 1948, shortly before the strike?

A. Not in 1948, I couldn't have been there because I was out of the Union in 1947.

Q. When did you leave the Union?

A. November, I think.

Q. By the way, what sort of work do you do now?

A. Bull gang foreman.

Q. For whom? [288]

A. For the Juneau Spruce Corporation.

Q. You are one of the bosses down at the Company now, so to speak?

A. Yes.

(Testimony of Glen Kirkham.)

Q. Just what is your position there?

A. Well, it is fixing docks and building barges and piling up lumber somebody knocks over and anything I am supposed to do in that line of work.

Q. Are you paid a monthly salary by the Company?
A. No, I am paid by the day.

Q. Do you have men working under you?

A. Yes.

Q. How many?

A. That depends. Sometimes a couple, sometimes eight or ten.

Q. When were you employed on that basis?

A. This particular one?

Q. Yes.

A. I was yard foreman. I don't remember when I was taken off, but when Mr. Shultz came he changed it to bull gang foreman.

Q. And you left the Union?

A. It was right after that was signed, that contract.

Q. When did you get this foreman's job you now have?
A. In November.

Q. And then you left the Union, is that true?

A. Yes.

Q. Aren't you still friendly with the Union?

A. Why, sure.

Q. Did you discuss this problem with the Union people, I.W.A.?

A. Since I got out of the Union? Nobody discussed these things with me since then. Once in

(Testimony of Glen Kirkham.)

a while it was mentioned, a few things, but not general discussion or anything of that kind.

Q. You learned that Local 271 voted to turn the work over to the longshoremen?

A. No, I don't know anything about it.

Mr. Strayer: The witness testified he is no longer a member and he is not competent to testify to the views of Local 271.

The Court: Not unless he was at the meeting.

Mr. Anderson: That wasn't my question, may it please the Court.

Mr. Banfield: He asked "didn't you know that the I.W.A. voted to turn this work over to the International Longshoremen's Union" and the witness testified that he was not at the meeting of April 1 when that was done or the meeting of April 9.

The Court: It would call for hearsay, but if he wants hearsay he can ask for it on cross-examination. Objection overruled. [290]

Q. Did you learn that information, sir?

A. No, I never heard any one discussing that.

Q. Nobody in the plant or no friends of yours in the Union?

A. I have plenty of friends on both sides but we aren't down there talking this Union stuff down on the job.

Q. The strike, or rather the lockout, was on April 10, 1948?

A. I don't remember if it was April the tenth.

(Testimony of Glen Kirkham.)

Q. April 10, wasn't it?

A. Something like that.

Q. Between April 1, about March 15 until the time of the lockout, a great part of the discussion was about trying to avert this difficulty, wasn't it?

Mr. Strayer: I want to object to counsel's term "lockout." That is in great controversy here, whether there was a lockout or not. He can ask questions without using terms of that character.

Mr. Andersen: I simply based it on Mr. Hawkins' testimony that there was a lockout by the Juneau Spruce.

Mr. Strayer: That doesn't mean there was a lockout.

Mr. Andersen: I have a right to use his terms.

The Court: Mr. Hawkins testified your plans characterized the difficulty. You can't take advantage of that.

Mr. Andersen: Your Honor is probably right.

Q. In other words, we will put it this way. There were two pickets or four, on the tenth, weren't there, of April? [291]

A. There were two there on the tenth, if I remember right.

Q. So between April 10th and March 15th there was quite a bit of talk there at the mill, isn't that true?

A. I was switched to night foreman in the yard and the night shift didn't seem to know anything about this until the night of the strike, so I heard very little of that.

(Testimony of Glen Kirkham.)

Q. You didn't interest yourself in this problem?

A. They didn't present it to me.

Q. And you didn't interest yourself in it, isn't that true?

A. That is right. If I didn't know about it, how could I?

Q. Now you say you had a first meeting with a committee of the longshoremen where you discussed with the Union the work claims of the respective organizations; that is true, isn't it?

A. You mean when I was President?

Q. Yes.

A. I don't hardly get your question.

Q. Do I speak loud enough for you?

A. No, not quite.

Q. Tell me if I don't. How many meetings did you attend while you were President of the Local to discuss the question of work claims with representatives of Local 16 here? A. One.

Q. And when was that? [292]

A. I don't remember the date.

Q. It was in 1947? A. 1947 sometime.

Q. The fore or later part?

A. The fore part.

Q. The fore part?

A. It was before June, if my memory hasn't failed me too much.

Q. That is of 1947? A. 1947.

Q. And the longshoremen, as I understand your previous testimony, said that they always considered

(Testimony of Glen Kirkham.)

the handling of cargo in and around docks as their work, is that correct?

A. I don't know whether that was brought up at that particular time or not. We came together as to the loading of scows and barges.

Q. How long did the meeting last?

A. For half an hour.

Q. Nothing came of that, is that true?

A. Nothing so far as I know.

Q. It was just a general discussion where they talked with you?

A. We gave them the floor; let them explain what they wanted. Mr. McCammon and Mr. Ford done most of the talking. [293]

Q. Shortly after that was there another meeting with the I.L.W.U., that is, Local 16?

A. Not while I was there.

Q. While you were in office and with Local 16, nothing more was said about it, the matter simply dropped?

A. There was nothing while I was at the meetings.

Q. After that meeting you wrote a letter to Local 16?

A. Our Secretary wrote one.

Q. Did you look for a copy to see if you had one?

A. I have been out of the Union so long it wouldn't do me any good.

Q. Did you go up and inquire?

(Testimony of Glen Kirkham.)

A. I think it is up to the President of the Union to find that. I think he has it.

Q. At the Juneau Spruce Corporation and the Juneau Lumber Company, longshoremen had always done a certain amount of longshore work there, hadn't they? A. Done some; yes.

Q. After the Juneau Lumber sold to the Juneau Spruce, they had the same work?

A. They came down a few times when there were box shooks.

Q. There was no difference if it was the Juneau Lumber or the Juneau Spruce—they did the same work? A. I don't think you understand.

Q. Just answer the question. [294]

A. You don't understand.

Q. What I am asking is this: After the Juneau Lumber sold to the Juneau Spruce longshoremen still worked down there, substantially the same as when the Juneau Lumber had it, isn't that true?

A. I guess so.

Mr. Andersen: That is all.

Redirect Examination

By Mr. Banfield:

Q. Mr. Kirkham, did you ever make any investigation to determine whether I.W.A. men loaded barges under this Constitution?

A. Yes, I did.

Q. Where?

A. Down in the States, in different mills down below.

(Testimony of Glen Kirkham.)

Q. Do I.W.A. men load barges down there?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial, may it please the Court.

Mr. Banfield: May it please the Court, he is bringing in the Constitution. He used the phrase "from the stump to the finished product." We want to show just what the I.W.A. Union does under the Constitution with respect to loading barges under this Constitution.

The Court: You want to prove a custom? [295]

Mr. Banfield: I want to prove a practice: in other words, how they operate under the Constitution and By-Laws and what is meant by "finished products" in the Union By-Laws.

Mr. Andersen: May it please the Court, I think custom and practice have to be limited to this port. If we are going beyond this port, if we go one port beyond, then both sides can go to every port in the United States where I.W.A. would have a contract, and we would be here interminably. It is not a question of other ports, but here.

The Court: Custom can be general throughout the industry and is not limited to one port. If it is the purpose to prove custom here, the question may be asked.

Mr. Andersen: The same objection, may it please the Court.

Q. I withdraw that question and ask this question: Have you made any investigation to determine how this provision is interpreted by the I.W.A.

(Testimony of Glen Kirkham.)

on the West Coast? A. The West Coast?

Mr. Andersen: Just a minute. That question calls for "yes" or "no" answer.

Mr. Banfield: I asked if he made an investigation.

Mr. Andersen: The answer is "yes" or "no."

Q. You can answer. Did you? A. Yes.

Q. Where did you make the investigation? [296]

A. I made it down in Oregon.

Q. What did you find? A. I found——

Mr. Andersen: The same objection, as it is incompetent, irrelevant and immaterial.

The Court: I am wondering how it could be competent to show how this particular provision is construed elsewhere. I can't see how it is competent to show the construction placed on this provision by some other branches of this Union.

Mr. Banfield: If the Court please, the purpose is to show that from the stump to the finished product means from the time the timber is felled in the woods until the manufacturing is completed and it includes the transportation of it, at least certain phases of it. All the handling—I want to show it includes the handling of lumber.

The Court: In other words, what you want to show now is how this particular provision is interpreted by the Union generally?

Mr. Banfield: Yes, under their International Constitution, what is it that governs these people in their actions.

(Testimony of Glen Kirkham.)

The Court: Evidence is already in as to the interpretation by headquarters. Objection overruled. You may answer.

Q. You may answer that, Mr. Kirkham. [297]

A. You mean about the loading?

Q. Yes.

A. Around Waldport, Oregon, I inquired——

Q. I just asked what the interpretation was, not exactly what town, but——

Mr. Andersen: I object to that as calling for a conclusion of the witness.

The Court: I don't think at the present time he can state that, unless you examine him as to what interpretation is placed by the Union. One inquiry at a certain place is not a sufficient basis.

Q. I want to show what interpretation is placed upon it by various local Unions; what is the practice?

A. Down there they have regular loaders on those rivers. It is all scows there. They lift it to the dock, and after they lift it to the dock it is loaded and taken down the river and turned over to the longshoremen. I think they call them stevedores that load those boats, nothing but those scows.

Q. Are they I.W.A. men?

A. I don't know. They may be.

Mr. Andersen: I move that be stricken as speculative.

A. That is the way they load them.

(Testimony of Glen Kirkham.)

The Court: It doesn't appear that this information he has is sufficiently precise. [298]

Mr. Andersen: I move the answer be stricken, all of it.

The Court: The answer will be stricken.

Q. Now, Mr. Kirkham, how does your Union interpret this provision of the Constitution here? I want to know how it interprets it with respect to the loading of barges with lumber?

Mr. Andersen: He just testified he is not a member of the Union and didn't know much about it.

Q. How was it interpreted up to the time you left the Union and when you were President?

Mr. Andersen: May it please the Court, he left the Union in 1946, and in relation——

Mr. Banfield: I am sorry, it was in 1947. I would like to have the recital correct.

Mr. Andersen: He left the Union in 1947. It is too short a time.

The Court: Merely because he left the Union shortly after the execution of this contract would not preclude him from testifying if he was in the position he has been in since, in which he would be certainly likely to know how it was interpreted.

Mr. Andersen: Certainly not as a Union member, as I understand the question now, as foreman of the Company, rather than as a former member.

Mr. Banfield: I will withdraw the question.

Q. I will ask you, during the time you were President of Local M-271, I.W.A., how was the

(Testimony of Glen Kirkham.)

jurisdiction of the Local interpreted by the Local Union with respect to barge loading?

Mr. Andersen: That assumes something not in evidence; first, that there was such an interpretation, and secondly, it calls for a conclusion and opinion of the witness.

The Court: If there wasn't any such interpretation of course he may answer accordingly.

Q. Answer the question.

A. We said we would load the scows and barges. That is what the Local voted, and nearly one hundred per cent, too.

Mr. Banfield: That is all.

Mr. Andersen: No further questions.

(Witness excused.)

JOSEPH WILLIAM FRANCIS

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Mr. Francis, will you state your full name.

A. Joseph William Francis.

Q. Where are you employed?

A. At the Juneau Spruce. [300]

Q. How long have you been there?

A. I went to work there the 19th of January, 1948.

Q. Have you worked there ever since?

(Testimony of Joseph William Francis.)

A. Except for the period that the mill was shut down, April 9th to about the 19th of July, I guess.

Q. Have you ever been a member of Local M-271? A. You say, am I a member?

Q. Yes. A. Yes, sir.

Q. How long have you been a member?

A. Since shortly before the strike or the picket line.

Q. Were you present at the Union meeting April 9th by the I.W.A. members in 1948?

A. You mean the meeting the night before the picket line went on?

Q. Yes. A. Yes, I was.

Q. Tell us what happened at that meeting.

A. It wasn't a regular meeting because there was a lot of——

Mr. Andersen: Just a moment, to which I object as hearsay and irrelevant and incompetent, may it please the Court.

Mr. Banfield: If the Court please, the purpose is to show the reasons why the I.W.A. observed the picket line and did not go through it and why the mill shut down, their [301] actions at that time.

The Court: Objection overruled.

A. Well, as I say, it wasn't a regular meeting because it was just a general meeting of all the employees of the mill and there was a lot of discussion pro and con as to the legality of the picket line to be put on in the morning. Most of us just heard

(Testimony of Joseph William Francis.)

about it that afternoon. There were arguments about it and we decided——

Mr. Andersen: I object to narrative rather than conversation, may it please the Court. I think we should have conversation rather than the conclusions of the witness.

Q. How many men were there at this meeting, Mr. Francis?

A. So far as I know, the majority of the employees of the mill were there.

Q. One hundred?

A. I imagine closer to two hundred.

Mr. Banfield: May it please the Court, I think under such circumstances it would be impossible to tell what everybody said at the meeting and that we are entitled to generalize.

The Court: What isn't clear to me is why it is important to show the reasons they decided not to go through the picket line. It seems to me what is important is that they decided not to go through the picket lines, not the reasons by which they arrived at that; that it was instigated [302] and endorsed by the I.L.W.U., Local 16. The question is, did they encourage them? It seems to me the question ought to be directed to show that. At the present time the question is too general.

Q. Mr. Francis, when this meeting opened was there any report or anything submitted to the meeting of what happened previously?

A. To the best of my knowledge, no.

(Testimony of Joseph William Francis.)

Q. Was there any previous meeting of the I.W.A. in which any action had been taken?

A. I think there had been a week before or something.

Q. Were you there?

A. No, I wasn't a member of the Union at the time.

Q. But you were at the second meeting?

A. Yes.

Q. Was any report made at the second meeting as to what happened at the first meeting?

A. I tell you, it was such a jumbled mess I can't really say. One of them said if the picket line was put on there, we would be blackballed.

Mr. Andersen: I move that be stricken as hearsay, and incompetent, irrelevant and immaterial and not connected with the defendants.

The Court: It will be stricken if it is not connected with the defendants. [303]

Q. You don't remember the report of the previous meeting? A. No, I don't.

Mr. Banfield: I am afraid the witness wouldn't be competent to testify to that. We can prove it by other means.

The Court: You mean he couldn't testify to what you mentioned a moment ago?

Mr. Banfield: No, because he didn't hear what went on.

Mr. Andersen: I might be able to assist counsel. I have a copy of the minutes of April 1.

(Testimony of Joseph William Francis.)

Mr. Banfield: I am not talking about a meeting of April 1, and I don't need your assistance, thank you.

The Court: Counsel should address their remarks to the Court.

Mr. Andersen: I am in error. I didn't know Mr. Banfield would flare up at an offer of assistance.

The Court: Are you through with this witness?

Mr. Banfield: If the Court please, that is all.

Mr. Andersen: I have just a few questions. Do you wish to read this? (Showing a document to counsel for plaintiff.)

Cross-Examination

By Mr. Andersen:

Q. I direct your attention——

Mr. Andersen: May this be marked for identification, [304] Mr. Clerk?

The Court: Defendant's Exhibit A.

The Clerk of Court: The exhibit has been marked for identification Defendant's Exhibit A.

Q. Mr. Francis, I want you to read this and see if you recognize what it is. Do you recognize that document, sir?

A. Well, as far as my recollection went, at that meeting of what took place at that meeting, this appears to be——

Q. Does it refresh your memory?

A. This appears to be——

Q. Does it refresh your memory?

A. No; it isn't exactly what took place.

(Testimony of Joseph William Francis.)

Q. I only asked you, sir, if you recognized the document.

A. No, I don't. I have never seen it before.

Q. Do the contents refresh your memory at all?

Mr. Strayer: Your Honor, please, I think counsel should not use the document to refresh his memory until——

Mr. Andersen: I have shown it to counsel.

Mr. Strayer: You haven't shown it as competent. It is not this witness's record. It is somebody else's record.

Mr. Andersen: This purports, may it please the Court, to be the minutes of I.W.A. Local 271, here at Juneau, the minutes of the meeting of April 1, 1948, and the minutes of April 9, 1948, the witness having previously testified he attended the meeting of April 9, at which minutes of the [305] previous meeting were discussed.

Q. Now, with that before you, does that refresh your recollection?

A. Yes, we discussed whether or not——

Mr. Strayer: Has your Honor ruled?

The Court: I don't think it has to be his record.

A. We discussed whether or not we would cross the picket line.

Q. First answer, does it refresh your recollection?

A. No, I haven't seen these records, I haven't seen them. We discussed whether or not we would cross the picket line.

(Testimony of Joseph William Francis.)

Q. Let me have it. I will examine you a little further. You have read this, have you, sir?

A. That is right.

Q. On the meeting of April 9, didn't the I.W.A. Local discuss a motion that was made on April 1 and carried unanimously, isn't that true?

A. As I tell you, a general discussion took place. Five or ten men were talking on the floor at once.

Q. At the meeting of April 9, a special meeting, didn't they discuss a resolution, or a motion, rather, at a special meeting, which had been passed unanimously at a special meeting of April 1. Didn't they do that; didn't they discuss that previous motion that had been unanimously carried?

A. Possibly. I don't recall too well. [306]

Q. At that meeting of April 1 wasn't the discussion, wasn't this motion passed, "Motion made and seconded to go on record to not load barges. We figure this work belongs to the longshoremen" and it was passed unanimously. Wasn't that motion discussed?

A. This meeting of April 1?

Q. Yes. A. I wasn't there.

Q. I know you weren't there. That is what you have stated, but on April 9 didn't they discuss the motion passed April 1 and wasn't that the purpose, to further discuss the motion?

A. That is right.

Q. And the question is, a motion which had previously been made and seconded, "To go on record to not load barges. We figure this work belongs to

(Testimony of Joseph William Francis.)

the longshoremen," that is what was discussed, wasn't it? A. In a general way.

Q. And that previous motion had been passed unanimously by the Local?

A. By thirteen members, I think.

Q. On the meeting of April 9 which you attended, wasn't this motion made and seconded, "To take a vote on whether to cross picket line. Again a unanimous vote to honor picket line of" Local 16? Wasn't that passed by the 200 members [307] present?

A. It was, in this way. As I started to tell you, there was a general discussion as to whether the picket line was valid or invalid, whether the work belonged to us or the longshoremen. There was a general row, finally it was decided whether the picket line was legal or illegal, we wouldn't go through it until we knew more about it.

Q. That was unanimously passed, wasn't it?

A. Right.

Q. By the 200 members present. They decided for themselves they weren't going back to work, isn't that true?

A. That we wouldn't cross the picket line until we found out more about it. There was a lot of feeling for and against it.

Mr. Andersen: That is all. Thank you, sir.

Mr. Banfield: That is all.

(Witness excused.)

WILLIAM H. FLINT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Will you state your name, please.

A. My name is Mr. William H. Flint.

Q. Where do you live? [308]

A. A mile and a half out the highway from Juneau.

Q. How long have you lived here?

A. Since March the 6th or 7th of 1947.

Q. And have you worked for the Juneau Spruce Corporation? A. Yes.

Q. During what period of time have you worked for them?

A. I went to work for the Juneau Spruce on the second day of May, 1947.

Q. Until the present time? A. Yes.

Q. Have there been any interruptions in that employment? A. Yes.

Q. Now, Mr. Flint, are you a member of the International Woodworkers M-271? A. I am.

Q. How long have you been a member of that Local?

A. Since the first part of April of 1947.

Q. And did you attend meetings regularly in 1947?

A. From April until about the first part of November I went at least once a month.

(Testimony of William H. Flint.)

Q. And after that?

A. Then from then until the first part of April, 1948, I don't believe I attended. I may have attended perhaps one meeting, or two, maybe.

Q. And then after that? [309]

A. After that I missed only one meeting.

Q. Now, Mr. Flint, have you had any positions with the Union as Committeeman or officer?

A. Yes, in about I would say, oh, May, 1947, I was elected a Shop Steward and I held that job until April. The tenth day of April, about eight p.m., I was elected to head the Union, President of the Union.

Mr. Andersen: What year was that, counsel?

Q. April 10 of what year, Bill? A. 1948.

Q. And you are still President of the Union?

A. Yes.

Q. Mr. Flint, were you present at a meeting sometime in the summer of 1947, at which I.W.A. Local voted to determine what work they would do on boats and barges?

Mr. Andersen: To which I object as incompetent.

Q. And longshoring for the Juneau Spruce?

A. I couldn't answer that by saying I did attend a meeting just that way. I recall it was brought up to the officers. There was some argument.

Mr. Andersen: I object to that as not responsive, may it please the Court, whether he attended a meeting.

(Testimony of William H. Flint.)

Mr. Banfield: I will withdraw that question.

Q. Do you remember attending a meeting in the summer of 1947, at which the longshoremen had a committee there to discuss [310] what work they would like to have?

A. No, I wasn't at that meeting.

Q. You were not there? A. No.

Q. Did you attend the meeting of the I.W.A. on April 1 of 1948? A. Yes.

Q. How many persons were there?

Mr. Andersen: To which I will object as completely immaterial, may it please the Court.

A. Fourteen men.

Mr. Andersen: Please instruct the witness when I make an objection to remain quiet.

The Court: Yes. You should not answer when there is an objection. Objection overruled.

Q. How many persons were there?

A. Fourteen men, if I recall correctly, counting the officers, and also there was a group from the Local 16.

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial as to how many.

The Court: Objection overruled.

A. There were also a group from the Local 16, I.L.W.U. I would say about five members of their Local.

Q. And at this meeting, did the I.L.W.U. members, were they present at the time you held your official meeting or [311] was it before or afterwards?

(Testimony of William H. Flint.)

A. They were there before we called our meeting to order.

Q. And what did they say?

Mr. Andersen: May I have—that is all right.

A. They were there for the reason——

Mr. Andersen: Just a moment. I will object to that. The question was “what was said,” not the conclusions and opinions of the witness.

The Court: Yes.

Q. Tell what was said.

A. They said that they wanted work——

Mr. Andersen: And a further objection. I would like to have the names of the people mentioned, rather than saying “five people.”

The Court: The names should be stated.

Q. Will you state who was there representing the I.L.W.U.?

A. I can state some, but not all, of them. There was Joe Guy, Orville Wheat—Orville Wheat, I can't swear to that. I will say I think, I think but I am not positive. Then there was Mr.—I know he was an old fellow, I can't recall his name—one of the gentlemen that was out in the audience, I don't know his name.

Q. Which man?

A. On the end of the long row there.

Q. Mr. Burgo? [312]

A. That is right. And others—I don't recall who was there.

(Testimony of William H. Flint.)

Q. Do you remember any members of the I.W.A. there?

A. James Gleaton, Goldsmith and Nels Lee and myself, of course.

Q. All right. Tell us what the longshoremen's representatives said at this meeting.

A. They said they wanted the work of loading lumber onto the Company-owned scows and they said that the other group of Committeemen who had been sent up there before and asked for lift work and hoisters were in error and were no longer on the Committee and they did not want carrier driver or lift driver, but they would get for us the wage scale for the men who drove the hoister trucks as long as they were loading the barges. They said they had a contract for the work with the old Company, before Juneau Spruce, and that they did not show us, but they showed us the withholding slips, income tax slips, from the Juneau Spruce, where they had worked for Juneau Spruce.

The Court: You mean Juneau Lumber Mills or Juneau Spruce Corporation?

A. Juneau Spruce. And then they asked if we would take a vote and give them an answer after our meeting.

Q. Did they say anything about this contract with the Juneau Lumber Mills being binding on Juneau Spruce? [313]

Mr. Andersen: I object, may it please the Court, as calling for a conclusion.

(Testimony of William H. Flint.)

Mr. Banfield: I asked if they said anything.

Mr. Andersen: Also it is very leading and suggestive.

The Court: It is leading and of course it wouldn't be proper to ask it in that form unless it appeared that the witness didn't remember.

Mr. Banfield: He said—he indicated that was all they asked for and I am refreshing his memory now. That is the purpose. I didn't ask it in any way to suggest the answer. It is true it can be answered "yes" or "no."

Mr. Andersen: I submit the inflection was very suggestive. I submit the objection is made.

The Court: I think you had better ask him if anything else was said before that.

Q. Do you remember anything else that was said at this meeting by the I.L.W.U. men?

A. Naturally, when they said they had a contract which carried over from the old Company, why, it would be the idea there would be that.

Mr. Andersen: I object and move it be stricken. It is simply a narrative on the part of the witness and he testified as to a conclusion and I might also add that is an argument on the part of the witness.

The Court: Yes; it is not admissible. Objection sustained.

Mr. Andersen: The answer may be stricken, your Honor?

The Court: Yes.

Mr. Andersen: Thank you.

(Testimony of William H. Flint.)

Q. Did they say anything about whether or not the contract of the Juneau Lumber Mills carried over to the new Company? A. Yes.

Q. What did they say?

A. They said that whenever a company bought from another company they assumed the obligations of that company, which would be also their contract with them.

Q. Did the members of the I.L.W.U. say anything about your Constitution?

A. I think they mentioned the fact. Now, I couldn't swear to this one. They pointed out to us that our By-Laws did not cover barge loading or loading of any type, and after they left we did look it up in our By-Laws.

Q. But they brought up the subject?

A. I think they did. I am not positive of that.

The Court: You mean the By-Laws?

A. And Constitution for the Local Union.

Q. Did they say anything while they were there in regard to their practice otherwise or other places entitling them [315] to this work?

A. They said the work had always been theirs in this area and they had done the work for the Juneau Lumber Mills, and that work was the kind of work their Local did up and down the Coast and was a past practice of theirs to do longshore work.

Q. Did they say anything about what effect it would have on you men or did they say anything about picket lines on this meeting of April 1?

(Testimony of William H. Flint.)

A. They mentioned if they couldn't get the work otherwise they would have to picket the sawmill in order to get it.

Q. Was any statement made by the I.L.W.U. men as to what effect it would have on you men as workers if you went through the picket lines?

Mr. Andersen: I object, may it please the Court. In the first place, it is leading and suggestive. The witness went through the entire conversation. Now counsel says, did they say this or that? It is leading and suggestive and calls for a specific kind of answer.

The Court: Since the last question is on a new phase I think the witness should first be asked if they said anything with reference to the picket line.

Mr. Banfield: That has been answered, your Honor.

The Court: No, I think you just asked him—you have asked him in such a way, that is, the question is in such a [316] form that defense counsel objected to it.

Q. Let me go back to the previous question, Mr. Flint. Did the I.L.W.U. men say anything about the picket line?

A. I don't believe at that meeting that they stated anything about the picket line except the fact that they did not want us to go across that picket line.

Q. Did they say they would establish a picket line or would not?

(Testimony of William H. Flint.)

A. They did say they would establish a picket line if they couldn't get the barge loading.

Q. Did they say anything about what effect there would be on you men if you went through the picket line?

A. If we went through?

Q. Yes.

A. No, they didn't say anything about what would happen if we went through it at that time.

Q. What did the I.W.A. decide to do at that meeting about that work?

A. After they left we had about an hour's discussion, I would say, and then the President or Vice-President, acting President at the time, called for a vote on whether or not we would respect the jurisdiction of the I.L.W.U., Local 16, until more could be found out about the situation in case a picket line was established and the result of that vote was that thirteen men voted "yes" [317] and one man, I don't believe, voted at all.

Q. Now, Mr. Flint, in this discussion which the I.W.A. had, what factors influenced them in their decision; that is, what influenced you in your decision?

Mr. Andersen: That is immaterial, may it please the Court.

The Court: Yes, I rather think that is immaterial.

Mr. Banfield: If the Court please, I don't like to be argumentative. I would like to take an exception to the Court's ruling and ask a reconsidera-

(Testimony of William H. Flint.)

tion. I think it is entirely material for the witness to show the effect these representations of the I.L.W.U. had upon the members, to induce and encourage them to refuse to work.

The Court: Well, you have already brought out the factors.

Mr. Banfield: What they stated, but whether or not they believed or paid any attention to it——

The Court: You want to bring out that there were others? You have brought out that there was a thirteen to one vote, but not how, what the result of the vote was.

Mr. Banfield: If the Court please, we have showed what the I.L.W.U. represented to the Union. Now we want to show because of those representations or at least being influenced by those representations, that the I.W.A. decided not to go through the picket line and not work for their [318] employer and that is one of the fundamental things in this case, to show they were induced by the long-shoremen.

The Court: That is an inference the jury can draw. You have these facts that are brought out and they can appraise them and draw their own conclusions.

Mr. Banfield: I think the jury is entitled to know to what extent the I.W.A. was induced and encouraged by the I.L.W.U. One contention could be that they didn't believe it. Some other one might really be afraid of them and have felt that he was put on the ground where they might suffer.

(Testimony of William H. Flint.)

The Court: Well, you mean that there was some ground for their decision that hasn't been brought out?

Mr. Banfield: Not an additional representation by the I.L.W.U., but I want to show that the representations of the I.L.W.U. did, in fact——

Mr. Andersen: You are talking about Local 16, counsel; is that correct?

Mr. Banfield: Local 16, at this particular time, that Local 16's representations did, in fact, have an effect upon the action taken and did, in fact, induce and encourage the employees of the employer not to handle the products.

The Court: Isn't that an unavoidable conclusion?

Mr. Andersen: May it please the Court, I would like to assign the Court's conduct. The only physical facts we have here are what this witness stated. A few longshoremen went [319] up and talked about it. I think probably that the evidence is admissible so far as Local 16, but to go beyond and state a conclusion is error and this witness can't probe into the mind of anybody else or any other reasons which so far haven't been talked about. The longshoremen, Local 16, were there and made certain statements, and this witness testified to it. I think that closes the subject.

The Court: Unless there was a discussion of some particular ground presented by the Local 16,

(Testimony of William H. Flint.)

and that they gave it a lot of weight and that is what induced them to make their decision.

Mr. Andersen: As your Honor stated a few moments ago, it is only important or material whether or not they voted to go back to work. That is the only thing of importance. The rest is all immaterial, as I see it.

The Court: Do you wish to show that?

Mr. Banfield: Weight and credence.

The Court: To whom?

Mr. Banfield: To any or all.

The Court: You may show that if these grounds were discussed in such a way that it won't be a matter of speculation on the part of the witness.

Q. Were these various representations made by Local 16 discussed after the Committee from Local 16 left? A. Yes. [320]

Q. And do you know whether or not the representations made by Local 16 had any effect upon the members? A. Myself; yes.

Mr. Andersen: To which I will object, and I move that the answer be stricken. For the purpose of objection I ask the Court again to caution the witness not to answer when an objection is being made.

The Court: I think that the question should not go beyond eliciting the grounds upon which they made their decision.

Mr. Banfield: That is right. I am asking now if the representations made by the I.L.W.U. had any effect upon the final decision made.

(Testimony of William H. Flint.)

Mr. Andersen: I object to that as calling for a conclusion of the witness and hearsay, so far as the defendants are concerned.

The Court: You may answer if you know.

A. I know it influenced myself.

Mr. Andersen: I move that be stricken as not responsive.

The Court: The answer will be stricken.

Q. Did it influence you as a member?

A. Yes.

Mr. Andersen: I object to that as incompetent. May I again ask the Court to caution the witness.

The Court: I think it was immaterial. There was a majority vote and it would be the ground upon which the majority vote would be predicated that would be important, not what weight he gave to any particular facts.

Mr. Banfield: Obviously, if the witness is not permitted to testify what influenced the vote of the majority, he is going to have to testify what influenced his vote and we will call as many of the rest of the twelve as we can. We are precluded—I want this perfectly clear—from showing that the I.L.W.U. Local 16 representations had any effect on their decisions?

The Court: You have shown their representations and you have shown their decision, and now it seems to me that it is just a matter of inference as to what induced the decision.

Mr. Strayer: We shouldn't be put in the posi-

(Testimony of William H. Flint.)

tion of inference when we have positive testimony.

The Court: I ruled if you could show because of the discussion held there preceeding the vote what did make them make the decision, you can show that. That rule still stands. It appears now he can't speak for the others. He can only speak for himself. Now, if you consider it vital to your case since it is nearly noon, the Court will excuse the jury until two o'clock and you may make your offer in the absence of the jury.

Whereupon the jury was excused until two p.m. of [322] this day and retired from the courtroom.

Mr. Andersen: As long as there is no testimony being taken, I assume the witness also will be excused, your Honor?

The Court: Yes.

Whereupon the witness retired from the courtroom.

The Court: You may state what it is you desire to bring out by the witness.

Mr. Strayer: We consider that it is material, your Honor, to show the representations made by Local 16, I.L.W.U. did have an effect upon the minds of the members of I.W.A. in reaching their decision not to go back to work, and we contend we can prove that only by the witness on the stand to prove what the discussions were in the meeting of the I.W.A. after the I.L.W.U. left, discussions and sentiments, before the vote was taken.

(Testimony of William H. Flint.)

The Court: I ruled you could do that but I thought you wanted to go beyond. The majority action is precluded so far as what lay in this witness's mind. It sounds as though you wanted this witness to guess.

Mr. Strayer: I understand your Honor ruled out any testimony of what was said at the meeting after the Local 16 men left.

The Court: No; I ruled to the contrary. You could show whatever discussion was had preceeding the vote as distinguished from showing what the effect was on this person or [323] this witness's mind.

Mr. Banfield: I think the Court ruled we could show discussion brought out by the I.L.W.U.

The Court: Yes, so long as it was what the majority said and not merely what was in this witness's mind.

Mr. Strayer: May I get this? There were thirteen men voting on the motion to respect the picket line. It seems to me if all the other twelve men were here each should be allowed to say what influenced them because the sum total would indicate positively the reason for the action. If that is so, I should think each man present at the meeting would be allowed to express the effect on his mind of the representations.

The Court: The thirteen there would reflect the nature of this discussion?

Mr. Strayer: Very probably, if not certainly.

Mr. Andersen: May I be heard, your Honor? I

(Testimony of William H. Flint.)

love the parallel. There were thirteen members, and they call thirteen men. If they call thirteen men I would cross-examine them. At the next meeting this witness will testify there were two hundred men present. Mr. Strayer can call the two hundred men to testify here and I—and we, of course—can cross-examine. I love Alaska during the short time I have been here, Judge, but at the present time I have no intention of changing my residence and if we follow this line we will [324] be here *ad infinitum*. I think counsel misconstrues the law. The longshoremen came there and made certain statements. We certainly aren't bound, that is, Local 16 can't be bound, except by what they said. It doesn't make any difference what those people discussed in the meeting. It hasn't the faintest bearing on the ultimate conclusion at the meeting. Only what the longshoremen said, they can be bound by. The I.W.A. is not a party to the proceeding. What was discussed in camera is not our concern.

The Court: You make that additional objection to the one that it is hearsay?

Mr. Anderson: Yes, your Honor.

The Court: On the ground of competency?

Mr. Andersen: I beg your pardon?

The Court: On the ground of competency?

Mr. Andersen: Incompetent; yes.

The Court: I think it comes primarily within the rule or doctrine of *res gestae* and that is why I have been admitting it.

(Testimony of William H. Flint.)

Mr. Andersen: I can't see the application of *res gestae* at all because it isn't part of the things done within the doctrine of *res gestae*.

The Court: Isn't this one of the things done?

Mr. Andersen: Not under the doctrine of *res gestae*.

The Court: A matter of this kind has quite a scope. [325]

Mr. Andersen: I think it has a limited application.

The Court: I don't agree with you.

Mr. Andersen: *Res gestae*, as I understand, and I could be wrong, when something happens all of a sudden and people make exclamatory statements so soon after an event that there is no change of mind it is particularly spontaneous. Here, so far as *res gestae* is concerned, the testimony is so far that the men from Local 16 went up there before the meeting and had a conversation with, apparently, a Committee of the I.W.A. Then the witness testified the longshoremen left.

The Court: I understand all that.

Mr. Andersen: Then for one hour, may it please the Court, one hour, the I.W.A. discussed this and after they discussed it pro and con there was a unanimous vote.

The Court: I understand all that. It is not necessary to state it.

Mr. Andersen: It is not *res gestae* at all.

The Court: The charge is that they induced the

(Testimony of William H. Flint.)

employees to go out on strike. It goes to the principal fact of the case, and that is the ruling of the Court so far as the ruling of the Court is concerned. We will recess at this time.

Mr. Andersen: Before we recess, so I don't have to argue again, I understand the witness is permitted to testify what is in his mind? [326]

The Court: No.

Mr. Andersen: Or is it limited——

The Court: To what was discussed there.

Mr. Andersen: I needn't object again. I object on the grounds already stated.

The Court: Yes.

(Whereupon Court adjourned until two o'clock p.m. May 3, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the witness William H. Flint resumed the witness stand and the Direct Examination by Mr. Banfield was continued as follows:)

The Court: In the case of this witness I think there has been a lot of testimony as to conversations that might better have been eliminated, and as far as this witness is concerned you may ask him whether he knows what induced the action of his Union to which he testified, and if he answers that he does, then you may ask him what it was that induced the Union to take that vote, but as to any

(Testimony of William H. Flint.)

discussion leading up to it the Court holds that it is incompetent.

Q. Mr. Flint, do you know whether—do you know what induced the Union to take its vote at the meeting of April 1 and to decide to respect the picket line? A. Yes.

Q. Will you state what it was that induced them to do that? [327]

Mr. Andersen: Just a moment. I object for the reasons heretofore mentioned; that is, before the recess, and also upon the further ground that it calls for a conclusion and opinion of this witness, may it please the Court.

The Court: It calls for his knowledge. Objection overruled.

A. The fact that the longshoremen came to our Hall was the reason for having the vote, and the fact that they had told us they had a contract which covered that work and which would have been signed before our contract was signed, which I presume would therefore make our contract illegal or might cross it anyway. That caused the members to vote that the work should belong to them, also they stated it was their work in past practice and most unions go by past practice and therefore that would be their work on the basis of past practice, and the fact that they showed us withholding slips that they had worked for Juneau Spruce, that showed that they had been employees, and would therefore also be employees at the present time. That also in-

(Testimony of William H. Flint.)

fluenced the vote, and I could add something else, but it would probably be objected to.

Q. Now, did their representations which you testified to this morning, that they had this work all up and down the Coast and that the I.W.A. didn't have it, did that have any influence on your decision? [328]

Mr. Andersen: I object. The question was fully asked and answered.

The Court: I think all he can state is whether the representations made there is what induced them to take this vote.

Mr. Banfield: I am asking, if the Court please, if this particular statement made by the I.L.W.U. before the regular meeting of the I.W.A. as to coast-wise participation of the longshoremen had any influence.

The Court: I thought you brought that out.

Mr. Banfield: He said "past practice." I presume, here in Juneau.

The Court: All representations made for the purpose of inducing or apparently for the purpose of inducing favorable action on the part of the witness——

Mr. Banfield: We shall limit it strictly to what the I.L.W.U. represented before the meeting.

Q. Did that influence them?

A. Yes; the fact that the work of loading lumber——

Mr. Andersen: May it please the Court, the same objection to this line of questioning.

(Testimony of William H. Flint.)

The Court: The same ruling.

A. The fact that the work of loading lumber would be classed as longshore work because it was the act of handling cargo, and they stated to our meeting that they had and were [329] handling all the cargo on the West Coast and that this work was still the same kind of work, therefore it should remain in the scope of their jurisdiction.

Q. Now, Mr. Flint, did you attend a meeting of the I.W.A. members and any other persons who might have been there on April 9, 1948?

A. I did.

Q. Tell me where the meeting was, when it was and who was there.

A. The meeting was in the C.I.O. Hall in Juneau, at six o'clock in the evening, and all the employees of the Juneau Spruce were allowed to attend, in fact anyone in the Hall then of the Juneau Spruce who wished to attend were able to attend.

Q. And did the Company give the employees time off for this meeting?

A. Yes. The night shift starts at six o'clock. They came up to the meeting then they worked an hour or so later in the morning to make up for it.

Q. In other words, the shift was just delayed for a time.

A. Was delayed.

Q. At this meeting tell us what took place.

Mr. Andersen: The same objection, may it please the Court.

The Court: Objection overruled. I think first he ought to state whether any representatives of the

(Testimony of William H. Flint.)

defendants were there at the meeting.

Q. Do you know of your own knowledge whether there were any members of Local 16 there?

A. To the best of my knowledge, there were no members of Local 16 in the Hall.

Q. Could they have been there without your knowing? A. Yes.

Mr. Andersen: I object, may it please the Court.
The Court: Objection overruled.

Q. How many——

Mr. Andersen: Did the Court understand the question? Could there have been any?

The Court: The matter is of no importance. They can't bind you.

Q. How many persons were at the meeting would you say, Mr. Flint?

A. I would say perhaps 180, 150 maybe at the least.

Q. Was there action taken at the meeting as to whether or not the employees of the Juneau Spruce Corporation would cross the picket line?

A. Yes.

Q. How was that action taken?

A. After very much argument and oral discussion with several men on the floor at a time, the man who ran the meeting [331] got kind of disgusted with the way the meeting was going.

Mr. Andersen: I object.

The Court: Yes; tell what was done.

Mr. Andersen: May that be stricken, your Honor?

(Testimony of William H. Flint.)

The Court: Yes.

A. At the end of the meeting the man in charge of the meeting asked "Are we or aren't we going through?"

Mr. Andersen: I object to that also, as incompetent.

The Court: Objection overruled.

A. The man in charge of the meeting asked "Are we or are we not going through the picket line in the morning if it is established?" He said "All who are not going through, please stand." To the best of my knowledge, every man stood up, at least a great majority. That ended the meeting.

Q. Now, Mr. Flint, on April 10 did you go down to the mill? A. Yes.

Q. Was there a picket line there? A. Yes.

Q. Who was picketing?

A. I don't recall the names of the men, but there were signs on the pickets stating that it was I.L.W.U. Local 16, two of them.

Q. And how long did that picket line stay there?

A. It stayed there from that date up until right now, at the present time.

Q. Do they now—let me ask you this: when they first started to picket did they picket twenty four hours a day or just part of the day?

A. They picketed all day, twenty four hours a day.

Q. What do they do now?

A. They start picketing about seven o'clock and they quit about four forty-five or five o'clock.

(Testimony of William H. Flint.)

Q. In other words, they start in the morning and quit in the late afternoon?

A. That is right.

Q. Is that—tell me what hours the men work there at the mill now.

A. The men work from eight o'clock until half past four.

Q. And do you know how long the mill was shut down after the picket line was established?

Mr. Andersen: I think it is cumulative. It has been testified to about four times already.

The Court: It is not in dispute, is it?

Mr. Banfield: I think it is, and at least the jury should have it in mind, the dates they were there and the activities.

Mr. Andersen: Four witnesses already have testified that the mill hasn't worked between April 10 and July 19 or 16. [333] I think four people testified to it so far.

Mr. Banfield: I would like to ask the question. The mill hasn't operated since October 19 of 1948, to the present time. Maybe I could refresh my memory on that. I don't know.

The Court: Well, apparently there is no issue here as to the fact that the mill has been closed and the time that it has been closed has been established by one or more witnesses. That ought to be enough.

Mr. Banfield: It has not been established by any witness as to how long the mill operated after July 19.

(Testimony of William H. Flint.)

The Court: You may establish what hasn't been established then, in that respect.

Q. After July 19, Mr. Flint, how long did the mill operate? A. Until October 11.

Q. How many shifts a day? A. One.

Q. And after October 11 did it operate?

A. No.

Q. Now, Mr. Flint, after the picket line was established did the I.W.A. have any more meetings?

A. Yes.

Q. If so, were there very many present?

A. We had practically the whole membership for the first few weeks and as time went on it dribbled down to perhaps ten [334] per cent.

Q. How often did you have meetings?

A. Immediately after this dispute, we had a regular meeting the second Saturday of every month and the fourth Friday, and in each week in between we had a special meeting.

Q. Did the I.W.A. of which you were President at that time, make any investigation to determine the truth or falsity of these statements made by the I.L.W.U. members in the meeting of April 1?

A. Yes.

Q. And what did they find?

Mr. Andersen: To which I object as incompetent, irrelevant and immaterial and calling for a conclusion and opinion of the witness, may it please the Court.

The Court: I think the preferable way to get at

(Testimony of William H. Flint.)

it would be to show the action taken by the witness's Union after the investigation of the representations made by the defendants.

Mr. Banfield: If the Court please, the Court has excluded any testimony as to why they took the action they did afterwards; in other words, the findings and causes for taking the action.

The Court: It is the result again, rather than the process, by which they investigated and made their findings. I think we will be here interminably unless we stick to the [335] results rather than the means of arriving at the results. If, as this witness has intimated, the Union made an investigation later on these representations and then took other action on the basis of their findings, why that can be testified to, but as to what they discovered in the process of investigation, I don't think that is competent. You can ask the witness if he found or the Union found whether the representations were true or false.

Mr. Andersen: May it please the Court, that would call for the conclusion and opinion of the witness.

The Court: Nearly everything would call, so far as this kind of testimony is concerned, for an opinion. Objection overruled.

Q. Did the Union find these representations were true or false? A. False.

Q. Were they all false?

A. We asked them to show us where they did

(Testimony of William H. Flint.)

have—show us some written form of a contract where they did have the bargaining rights for that type of work. That contract was never shown to us. Also, as far as doing that kind of work at the Juneau Spruce before, or at the Juneau Lumber Mill, before we discovered that this was the first case of a Company-owned barge——

Mr. Andersen: I move that be stricken as hearsay and a conclusion and opinion of the witness.

The Court: His discoveries—he may state what was [336] done but not as to his or somebody else's opinions or conclusions during the process of the investigation.

Mr. Andersen: That is all that he is talking about.

Mr. Banfield: Your Honor, he answered once that it was false.

Mr. Andersen: It is clearly an opinion and conclusion of the witness.

The Court: You can cross-examine him on it. He has testified his Union found after investigation that these representations made to them were false. You can cross-examine.

Mr. Andersen: He doesn't show that he was on the Committee that made the investigation, your Honor.

The Court: You may cross-examine him. You may state what was done but so far as detailing what this person or that person said or thought during the investigation is not competent.

(Testimony of William H. Flint.)

Q. Go ahead and state what facts were established by the investigation to be false.

Mr. Andersen: I don't want to be presumptuous, may it please the Court. From what your Honor said, he should strike the word "false." That kind of evidence——

The Court: I have already ruled on that. Proceed.

A. As I said, we found this was the first case of a Company-owned barge being loaded at the Juneau Spruce, therefore there was no past practice on that particular type of work. [337] We also found that this same type of work, with—in other words, the loading of lumber on Company-owned scows, with Company-owned gear, was being done in the States by our Locals, I.W.A. Locals in some places.

Mr. Andersen: I move that be stricken as having nothing to do with the representations made by the I.L.W.U. Local 16.

Mr. Banfield: If the Court please, the testimony was that at the meeting of April 1 the I.L.W.U. represented they did all of the loading of this type up and down the Pacific Coast.

The Court: After investigation it was found to be false?

Mr. Banfield: This is corroborating it, in other words.

Q. Now, Mr. Flint, about May 8, 1948, did you have any meetings with any members of Local 16 or any representatives of the I.L.W.U. International

(Testimony of William H. Flint.)

regarding the settlement of this dispute or the continuation of it? A. Yes.

Q. Now, tell us what meetings you had and what occurred and who was present and where. Start out with when, who and where.

A. We had a meeting on May 8 about four p.m. in the C.I.O. Hall in Juneau with Local 16 members, Vern Albright, [338] International representative of the I.L.W.U., myself and our Committee members, and Virgil Burtz, who is the Assistant Research Director of the I. W.A.

Q. And where was this? At the C.I.O. Hall?

A. That is right.

Q. Tell us now, what did the I.L.W.U. have to say at that meeting?

A. The main idea of the meeting was to see if we could settle the dispute and get the picket line removed and get our members back to work. It was more or less a meeting for our representative to find out what the case was about—he arrived on the plane that day—he got it from the I.L.W.U. and from us, on both sides, so he could investigate it and he also got the assurance from the I.L.W.U. in case this dispute would come to the point that it was deadlocked and nothing was being done, that they would remove their picket line and allow our Local in, our Union people.

Q. Did the I.L.W.U. promise that?

A. Yes.

The Court: Who, on behalf of the I.L.W.U. promised that?

(Testimony of William H. Flint.)

A. All the members that were there at the meeting from the I.L.W.U.

The Court: Are you speaking of the Local or the [339] International?

A. Local 16 and also Vern Albright, the International representative.

The Court: That is all.

Q. Where is Mr. Burtz from, where does he live?

A. He lives in Oregon.

Q. He lives in Oregon?

A. Portland, Oregon, is his home.

Q. And now, did Mr. Garst come on the scene about that time?

A. Mr. Garst arrived about a week or little less than a week later.

Q. Who was he?

A. He was representtaive of the United States Mediation and Conciliation Service.

Q. Now, did you have a meeting with him?

A. Yes.

Q. Tell us about the meeting that you had with Mr. Garst.

Mr. Andersen: I object to that as hearsay, may it please the Court.

The Court: Was it part of the same meeting?

Mr. Banfield: No, Mr. Garst arrived a week later.

The Court: I think the objection will have to be sustained.

Q. Was there any representative of the Local or the International at this meeting? [340]

(Testimony of William H. Flint.)

A. Vern Albright was there.

Q. Pardon?

A. Mr. Albright, the International representative.

Q. And where did the meeting take place?

A. The first meeting took place in the hotel room of Mr. Garst, at the Baranof Hotel.

Q. There was yourself, Mr. Garst and Mr. Albright? Was there anyone else?

A. Virgil Burtz.

Q. What was said after you arrived at this meeting?

Mr. Andersen: Could I have the date of this meeting?

Mr. Banfield: It is identified.

Q. Was it right after Mr. Garst arrived?

A. Yes; the day he arrived, May 14 or 15, somewhere in that area.

Q. For the sake of convenience, we will call this the meeting of May 14.

A. All right.

Q. At this meeting on May 14 what was said by the I.L.W.U. and its representative, Mr. Albright?

A. I will have to lead up to that before I could answer the question.

The Court: Just state what occurred there.

A. I arrived and the meeting was already going for several hours or minutes, whatever it was, anyway before I got there. [341] It was explained to me by Virgil Burtz that a letter was being written. E. H. Card was writing a letter to the Company and

(Testimony of William H. Flint.)

outlining the jurisdiction of the two Locals and that he was going to have the letter brought back to the Baranof Hotel and Mr. Albright and myself and Mr. Burtz and Mr. Garst would look the letter over. Well then, the letter arrived and the jurisdiction was outlined.

Q. Was Mr. Albright there when the letter arrived?

A. Yes, and Mr. Albright read the letter and stated that one line which was in it was not the way it ought to be and would like to have it changed, and so we asked him if he would put it down as he wanted it and which he did, and he said if that was changed exactly the way it was written down that he would agree to it, so the letter was sent over to the Company again and that time——.

Q. For what purpose?

A. To have this line re-written, and at that time Mr. Albright went back to his own hotel room.

Q. Now did—was the letter returned there to the hotel? A. Yes.

Q. Did you hear Mr. Burtz communicate with Mr. Albright? Do you have the letter or a copy of it, Mr. Flint? A. Yes.

Q. Could we see it? [342]

The Court: What are we waiting for now?

Mr. Banfield: For counsel to see the letter.

Mr. Andersen: I assume my objection runs to this testimony as incompetent and irrelevant. The entire testimony; I assume the same objection may run to it?

(Testimony of William H. Flint.)

The Court: Yes. Is this the letter the witness testified to a moment ago?

Mr. Banfield: Yes. I would like to ask Mr. Flint one question.

The Court: You are offering it in evidence now, aren't you?

Mr. Banfield: Yes.

The Court: It may be admitted and marked.

Mr. Andersen: I object to this as incompetent, irrelevant and immaterial, may it please the Court, and hearsay.

The Clerk of Court: This will be Plaintiff's Exhibit 6.

Q. Now, Mr. Flint, is this the letter Mr. Albright agreed to, that is, the terms of it?

A. That is right.

Q. And that is the final draft?

A. That is the final draft.

Mr. Andersen: I move the words "agreed to" be stricken as an opinion and conclusion of the witness, may it please the Court. [343]

The Court: Objection overruled.

Mr. Banfield: I would like to have the record show the letter, concerning which the witness was just questioned, is Plaintiff's Exhibit No. 6. I would like to read the letter at this time to the jury. "May 14, 1948. Mr. Virgil Burtz, International Woodworkers of America, CIO Juneau, Alaska. Dear Sir: Relative to your inquiry and request made in the presence of Commissioner Garst with respect to

(Testimony of William H. Flint.)

work requirements under our contract with Local M-271, IWA-CIO, we wish to advise as follows: All work on Company equipment and Company material is to be performed by Company employees under the terms of our contract with Local M-271. This includes the loading and unloading of Company barges or scows with lumber or other materials belonging to the Company, on Company owned or controlled property. We will not permit our employees to work on equipment or means of transportation belonging to other parties. This would mean that in the case of commercial steamships having the necessary equipment to load with, our employees would deliver the lumber with our equipment to ship's side where their work would end. Loading would be done by persons employed by the steamship over whom we would have no jurisdiction. In the case of unloading of any material consigned to Juneau Spruce and shipped by commercial steamship, unloading would be done by persons employed by the ship and our employees would not be permitted to perform the work. [344] "Once the materials or supplies had landed on our dock and the ship's tackle, (nets, gear, pallet boards etc.) are released our employees would perform the necessary work from that time on. In the case of cannery tenders or other boats having no equipment to load with we would use our crane and whatever men were necessary to that operation, but would not permit our employees to go aboard the boat to perform

(Testimony of William H. Flint.)

any work. Handling of lumber or box shook on board the boat would have to be done by persons employed by the boat, presumably longshoremen. In event our employees decide to return to work you have our assurance that there will be no discrimination against any of them because of their having engaged in union activity, or because of their having refused to cross the picket line at our plant. Very truly yours, Juneau Spruce Corporation, By E. H. Card."

Q. Mr. Flint, do you have the original copy of that letter? A. No. I do not.

Q. Does the Union have it in its files?

A. I doubt it very well.

Q. It was addressed, I believe, to Mr. Burtz?

A. That is right.

Q. Have you ever seen the original since this time? A. I can't recall having seen it.

Q. Now, after this letter arrived at the hotel, did you hear anyone communicate with Mr. Albright?

A. Yes.

Q. How was that communication made?

Mr. Andersen: Oh, now, just a moment. I will withdraw the objection for the moment, except that I am going to object on the ground that it calls for a conclusion and opinion, may it please the Court.

Q. Just state what was done.

A. Mr. Albright went over to his own hotel so when the letter came back from Mr. Card, why there had to be a phone call made to get ahold of

(Testimony of William H. Flint.)

Mr. Albright again. This was made by Virgil Burtz from his room in the Baranof. I listened while he called Mr. Albright. He told Mr. Albright that the letter had come back.

Mr. Andersen: I move that be stricken as hearsay and a conclusion and opinion of the witness.

The Court: Objection overruled.

A. He told him the letter had come back, and would like to have him sign it and that we get this thing all cleared up. Mr. Albright said something, I don't know what, and Burtz said "What has the International got to do with this?" and Mr. Albright said something else and Mr. Burtz then asked me if we could have a meeting that evening of Mr. Albright and Local 16 and I said "Yes" and he talked on the phone again and told Mr. Albright that there would be a meeting that night in his room in the Gastineau, [346] Mr. Albright's room in the Gastineau.

Q. Now, did you have a subsequent meeting with Mr. Albright? A. Yes.

Q. When was that?

A. That took place that same evening in Mr. Albright's room in the Gastineau Hotel.

Q. And who was present?

A. Mr. Albright, several members from I.L.W.U. Local 16, John Olafson——

Q. Who was John Olafson?

A. Secretary at that time of the I.F.A.W.A. or something.

(Testimony of William H. Flint.)

Q. A union?

A. Yes, C.I.O. A fishermen's local.

Q. A fishermen's local union?

A. That is right.

Q. Who else was present?

A. And Virgil Burtz and myself and there was some other members of our Local, I don't remember the names.

Q. Was Mr. Garst there?

A. Yes, Mr. Garst was there.

Q. What happened at that meeting?

Mr. Andersen: The same objection, may it please the Court.

The Court: Mr. Albright was present at that meeting? A. Yes. [347]

The Court: Go ahead.

A. We asked Mr. Albright why he wouldn't sign the letter and he said that he had a phone call from his International and also received a letter, which he said had made things, well, different, and it wouldn't work out if he signed the letter like he was going to do in the afternoon.

Q. Did he refuse to sign the letter?

A. Yes.

Q. And did he state to whom this letter had come?

A. If I recall correctly, he had received one and also the Local had received a—the Local, of that I am not positive. One or the other received a letter.

Q. Did he say who the letter had come from?

(Testimony of William H. Flint.)

A. From the International Union.

Q. Did he say anything else about any reasons for not doing this?

A. He stated he received word from another sawmill in Alaska, Sitka sawmill where the A.F.L. had the bargaining rights for the sawmill and that they were attempting there to take over the barge loading away from the longshoremen in that port also, and that if he had signed that letter that that would have given them an opportunity to take the barge loading away from the longshoremen in Sitka.

Q. Now, during the period from April 10 until July 19 were there any other efforts made in dealing directly with the [348] I.L.W.U. to settle this dispute? A. Yes.

Q. Just tell us what they were.

A. We had several meetings and we offered once that we would put the dispute up to the National C.I.O., a jurisdictional dispute, the C.I.O. council.

Mr. Andersen: May I have the time please and the persons present at this meeting?

A. I believe that was made quite a few different times.

Mr. Andersen: May it please the Court, may I have counsel lay a proper foundation?

The Court: Yes. The time ought to be fixed for it.

A. As near as I can remember, it was made by Virgil Burtz after he arrived. He arrived May 8 and it was perhaps a couple of days later, the eleventh of May, I would say probably.

Q. Was that done at a meeting with I.L.W.U.

(Testimony of William H. Flint.)

members?

A. I think it was an offer to Mr. Albright.

Q. Do you know where the meeting was, where the offer was made to Mr. Albright?

A. From the time that Burtz arrived here he spent every day with Mr. Albright. I was with them practically all the time myself and the offer could have been made any time.

Q. You don't know just what time it was?

A. No. [349]

Q. Do you know definitely the offer was made?

A. Yes, I know it was made.

Q. Explain just where the C.I.O. comes into this offer.

A. Well, the fact that both Locals in this dispute are C.I.O. Locals and are both under the same National Union and ordinarily if there is some dispute between a couple of C.I.O. locals or International Unions, either one, it would go up before the C.I.O. itself and they would settle the dispute as to who had jurisdiction.

Q. What was the decision, that is, what did Mr. Albright say about this proposal?

A. He said "No."

Q. Now, you testified that the I.L.W.U. had offered to pull off the picket line if things got too tough, and did the I.W.A. ever take them up on that offer?

A. Yes.

Q. When was that?

A. We asked them several different times about that, from time to time.

(Testimony of William H. Flint.)

Mr. Andersen: Could I interrupt? The I.L.W.U., you mean I.L.W.U. Local 16?

Mr. Banfield: I will have to ask the question differently, counsel.

Q. Did you ever submit a proposal to either Local 16 or the International, and if so, which, to have them pull off [350] the picket line because things were getting too tough in the Union?

A. Yes.

Q. Who did you submit that to, the Local or International?

A. Mr. Albright and the Local, both.

Q. And what was the answer you got back from Mr. Albright?

A. Usually it was that we wait a little while and see if something happened, and because when we asked they would agree to pull their picket line.

Q. And did they follow through on that?

A. No, because——

Mr. Andersen: May it please the Court, I move that be stricken in its entirety. He started out to talk about Mr. Albright and then lapsed into plural terms and I don't know who he is talking about or to whom. May it be stricken, your Honor?

The Court: It should be made a little more certain, but any incidences of that kind can be taken care of on cross-examination.

Mr. Andersen: We will be put to extensive cross-examination, your Honor.

(Testimony of William H. Flint.)

The Court: No more so than counsel will be put to on direct.

Q. Mr. Flint, who promised to pull off the picket line?

A. Mr. Albright and the delegation from Local 16. [351]

Mr. Andersen: Could I have the time and place please?

Q. Do you know about when that was, you know it was after the picket line was established?

A. That is right.

Q. Before you went back to work? A. Yes.

Q. Place it as closely as you can in between.

A. I would say on May 8 when we had our meeting that afternoon.

Q. Now, did they pull off the picket line as promised? A. No.

Q. Did they promise to take it off right away or sometime in the future?

A. They said if it got to the point where our Local, well, would blow up and there wasn't any members left—in other words, our Local would be out of business—they would pull their picket line to save our Local.

Q. Did they say they would do that at your request or whenever they felt like it?

A. Whenever they felt it got to the point where we were going broke.

Q. Did you, pursuant to that agreement, inform them of the conditions in the Local? A. Yes.

(Testimony of William H. Flint.)

Q. And what did you tell them? I am speaking about Mr. [352] Albright. What did you tell them?

Mr. Andersen: I object.

The Court: You should be specific.

Q. Who did you tell it to?

A. I told it to Mr. Albright and several members of Local 16 at various times.

Mr. Andersen: May I have the time please, may it please the Court?

The Court: I assume he will follow it up.

Q. Identify it as well as you can; was it a month after May 8 or a week?

A. I could give you perhaps a hundred different times if I could recall all of them.

Q. Tell us one of them?

A. One I know of for certain was a week before we went back to work.

Mr. Andersen: Do I understand the witness to say he talked to Mr. Albright then?

A. That was a meeting of Mr. Albright and Local 16.

Mr. Andersen: Read the answer please, Miss Reporter.

Court Reporter: "One I know of for certain was a week before we went back to work."

Mr. Andersen: A week before July 19. I see.

A. No, that is not correct.

Mr. Andersen: Pardon me. I am just having your [353] answers read.

Q. When was it that you told——

(Testimony of William H. Flint.)

Mr. Andersen: It has been asked and answered. He testified it was a week before he went back to work, July 19. It has been asked and answered, may it please the Court.

A. No.

The Court: He has indicated there is apparently a mistake about July 19. You may correct your testimony.

A. All the mistake here is that the mill started operation July 19. That was not the date when our Union went back to work at the sawmill.

Q. All right. When did you men first go back to work? A. The sixth day of July.

Q. You say it was about a week before that?

A. That is right.

Q. Who was present when you told him?

A. Leonard Evans, who at that time I believe was with the Labor Department, and members of Local 16, Mr. Albright, myself and my Committee members.

Q. Where was the meeting?

A. In the C.I.O. Hall.

Q. And what did you tell them?

A. I told them it had got to the point where our Local was going out of business because our members were leaving town. There was no work for them, and if it kept on very [354] long, why we wouldn't have any Union.

Q. Did you make any further requests?

A. I asked them to pull their picket line and leave us go back to work.

(Testimony of William H. Flint.)

Q. What reply did you get to that?

A. They said "Yes."

Q. They agreed to pull it? A. Yes.

Q. Who agreed to pull it?

A. Between Mr. Albright and the Local boys.

Mr. Andersen: I move that be stricken as not responsive.

Q. How many people said it?

A. In a meeting of that type they always have one man who is spokesman for the whole group.

Q. Who was spokesman?

A. Mr. Albright.

Q. On whose behalf was he speaking?

A. On behalf of Local 16, and seeing as he was a representative of the International, I imagine——

Mr. Andersen: I move that be stricken.

The Court: Read the witness's answer.

Mr. Andersen: After the word "seeing" I move it be stricken.

The Court: I don't know what the answer was. Will [355] you read it?

Court Reporter: "On behalf of Local 16, and seeing as he was a representative of the International, I imagine——"

The Court: Well, perhaps what he imagined should not be stated.

Q. Was the picket line pulled? A. No.

Q. Was any reason given to you by Local 16 or by Mr. Albright? A. Yes.

Q. What was the reason?

(Testimony of William H. Flint.)

A. At that meeting——

Mr. Andersen: May I have a foundation laid for this meeting, please?

The Court: It was the same meeting.

Mr. Andersen: I understood it wasn't. I understood counsel to refer to another meeting.

Q. They promised at a meeting a week before you went back to work that they would pull the picket line?

A. That is right.

Q. When they refused to do it——

Mr. Andersen: That assumes something not in evidence.

The Court: He testified they refused to do it.

A. I don't believe I testified that, your Honor. I testified the picket line was not pulled. [356]

Q. Now, I ask you, was any reason given you for not pulling it? Was there a reason given?

A. Yes.

Q. When was it given to you?

A. At that meeting.

Q. At that same meeting?

A. The same meeting.

Q. The same night? A. The same night.

Q. All right. By whom?

A. That was—the whole thing wasn't just a case of "we will pull the picket line." It was a plan whereby the picket line could be pulled under certain conditions and the fact that we did not agree to that was why the picket line was not pulled.

(Testimony of William H. Flint.)

Q. They agreed to pull the picket line and then——

Mr. Andersen: I object.

Mr. Banfield: Wait until I am through.

The Court: It embodies the answer.

Q. Do you know if the conditions under which they would pull the picket line were imposed in advance or were imposed after they agreed to pull it?

A. The agreement was, "we will pull the picket line if our conditions go on as written out there."

Q. They conditionally promised to pull the picket line? [357] A. That is right.

Mr. Andersen: I move that be stricken. The witness states it was written up. The writing would be the best evidence.

The Court: That is true, the writing should be produced.

Q. Where is the writing?

A. I imagine it was ripped up after the meeting and put in the wastebasket, seeing as it wasn't any good.

Mr. Andersen: I move that be stricken as an opinion.

The Court: Objection overruled.

Q. Did you keep a copy? A. No.

Q. Do you know where there is a copy?

A. No. It was written. There were pictures and marks on it and it wouldn't be a legal document whatsoever.

(Testimony of William H. Flint.)

Mr. Andersen: I think that is for the Court to determine. There is no foundation.

The Court: I guess he refers to some peculiar chart.

Q. Mr. Flint, did you take a trip in the fall of 1948? A. Yes.

Q. How long had you worked at the mill before you took this trip in the fall of 1948?

A. I stated before I worked from the second day of May for the Juneau Spruce Corporation until now. [358]

Q. From the second day of May, 1947?

A. That is right.

Q. In the summer of 1948 before you took this trip, do you know whether or not there were any barge loads of lumber shipped from the Juneau Spruce Corporation?

A. Before I took the trip?

Q. Yes. A. In the fall of 1948?

Q. Yes.

A. There was a barge load at the Juneau Spruce; yes.

Q. Do you know where that barge went?

A. I merely saw the barge going out of the Channel and I knew—I mean I was told by different people in the office of the Juneau Spruce that it was going down to Prince Rupert.

Q. Do you know where it actually went?

A. I do not know actually myself. All I know is hearsay.

(Testimony of William H. Flint.)

Q. Do you know whether or not that barge was unloaded or not?

A. No, it was not unloaded.

Mr. Andersen: I move that be stricken, may it please the Court, as a conclusion and opinion of the witness, and I further object——

The Court: He says “I know.”

Mr. Banfield: He said, “No, it wasn’t unloaded.”

Q. Where did you see the barge not unloaded?

Mr. Andersen: That is getting back to the question of what the witness knows. I told your Honor earlier that throws the door wide open as to what a person knows. Whether something was done or not depends on a proper foundation. To simply say, “Do you know”—there is no foundation for knowledge, may it please the Court.

The Court: It is just as simple to say, “I knew the sun was shining a while ago.” I think where the witness is asked——

Mr. Andersen: The question would be, “Did you see the sun shining?”

The Court: He asked in those terms.

Mr. Andersen: I want to further object. As I indicated the other day Prince Rupert is in Canada. Our position is that anything that happened or may not have happened in Prince Rupert is not material to this case.

The Court: I rule now as I did then. It is evidentiary and admissible. Proceed.

(Testimony of William H. Flint.)

Q. Did you ever see this barge after that?

A. Yes; I saw the barge.

Q. Where?

A. I saw it in Tacoma, Washington.

Q. Was it still loaded? A. Yes.

Q. Was it still loaded with the same lumber and in the same [360] manner as when it left here?

A. Yes.

Q. Did you make any investigation there to determine why it had not been unloaded?

A. Yes.

Q. What did you find?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial and hearsay.

The Court: Is it based on hearsay?

Q. Who did you talk to about it?

A. I talked to the I.L.A., that is the A.F.L. longshoremen.

Q. What is the I.L.A.?

A. International Longshoremen's Association.

Q. What did they say about it?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial and heresay.

The Court: Objection sustained.

Q. Did you ask them to unload the barge?

Mr. Andersen: The same objection, may it please the Court.

The Court: Objection overruled.

Q. Did they agree or refuse—

Mr. Andersen: I object. The same thing, hearsay.

(Testimony of William H. Flint.)

The Court: Objection overruled. Did they unload it or did they not? [361]

A. They did not.

Q. Mr. Flint, before all you men went back to work in July of 1948, did they take any action as a Union to decide whether or not the men would return to work? A. Yes.

Q. Tell me, was that action taken at a meeting?

A. Yes.

Q. And what did they decide to do?

A. They decided that they would go back to work.

Q. Now, when they returned to work, did all of the members of the I.W.A. return to work?

A. No.

Mr. Andersen: I object to that as irrelevant, incompetent and immaterial.

The Court: Objection overruled.

Q. About how many members did you have at that time? A. Oh, I would say forty maybe.

Q. How many members of those forty do you think went back to work?

A. I got your first question wrong. I gave the answer what we actually had, who went back to work.

Q. How many members of the I.W.A. were holding cards in good standing at that time?

A. About a hundred and fifteen or twenty were holding the cards, I suppose. [362]

Q. How many went back to work on or immediately after July 6?

(Testimony of William H. Flint.)

A. Oh, about forty I would say.

Q. Now, in the course of time, did more come back to work, more of your members?

A. You are talking about which date?

Q. After July 6. You say about forty went back to work, right away.

A. I got mixed up again. The sixth of July we went back, the mill was not ready for operation, therefore only a small amount of men went back to repair the mill so it could operate. I would say about eleven went back on the sixth to get the mill ready, and on the nineteenth of July when the mill was ready for operation there was the other number I mentioned went back to work and then after that date I doubt if any more of our men came back to work.

Q. Now, do you talk to the men, the members of the Union, about why they don't come back to work?

A. Yes.

Q. And why don't they come back?

Mr. Andersen: I object to that as hearsay, may it please the Court.

The Court: Why?

Q. Why is it that the members of the I.W.A. who are not working there but who did work there before the strike, [363] why is it they do not come back to work?

The Court: If he knows——

Mr. Andersen: That calls for an opinion and conclusion of the witness.

The Court: Objection overruled.

(Testimony of William H. Flint.)

A. They tell me if they come back they have to cross the picket line, therefore they do not wish to do that.

Q. Were there some men who came back after the nineteenth of July who were not members of your Union but who had worked there before?

A. I don't believe so.

Q. Are there any non-Union men working down there now? A. Yes.

Q. Have you talked to non-Union men who worked there before the picket line was established and immediately before, who have not returned to work? A. No.

Mr. Andersen: Same objection, your Honor.

The Court: What is the question? Repeat the question.

Court Reporter: "Have you talked to non-Union men who worked there before the picket line was established and immediately before, who have not returned to work?"

The Court: Answer that "yes" or "no."

A. No. [364]

Q. Now, how long did you say the mill operated after it got started in July?

A. Until October 11.

(Whereupon Court recessed for ten minutes, reconvening as per recess with all parties present as heretofore and the jury all present in the box; whereupon the witness William H. Flint resumed the witness stand and the Direct Ex-

(Testimony of William H. Flint.)

amination by Mr. Banfield was continued as follows:)

Q. Mr. Flint, what is the present official position of Local M-271 with respect to claiming the right to load these barges?

A. The position of M-271 is that we will load the barges until the National Labor Relations Board provides otherwise.

Q. How long has this been the official position of the Union? A. Since July 2, 1948.

Q. Now is I.W.A. Local M-271 a labor organization? A. Yes.

Q. Do its members participate in its affairs?

A. Yes.

Q. Does it bargain collectively for the employees of the employers? A. Yes.

Q. Now, in these various meetings which you have had with Mr. Albright, well, did he at any time ever tell you who [365] he was or what his official position was?

A. He told us that he was the International representative of the I.L.W.U. in Alaska.

Q. And meaning that he represented what; that is, you say the International; what did he say, some local?

Mr. Andersen: I object to that as calling for a conclusion and opinion of the witness.

The Court: If he knows what he claimed.

Q. He claimed that he was a representative of the International or the Local?

A. International Union.

(Testimony of William H. Flint.)

Q. Where did he claim his area or his jurisdiction was?

Mr. Andersen: This word "claim" calls for a conclusion and opinion of the witness.

The Court: The what?

Mr. Andersen: He used the word "claim," what he claimed. It is not a question of evidence, it is a question of conclusion.

Q. What did he say?

The Court: As I have said before, it is difficult to avoid an element of conclusion and opinion in a lot of questions. The Court can't rule them all out. Objection overruled.

A. What was the question?

Q. What did he say his area of jurisdiction was; that is, of [366] what area does he have jurisdiction? A. All over Alaska.

Q. Did he at any time in your presence state that he represented Local 16?

A. No; he said that he was here to advise Local 16 in their matters.

Mr. Andersen: I move that be stricken as not responsive to the question, may it please the Court.

The Court: Motion denied.

Q. Now, Mr. Flint, at this meeting on May 8, 1948, you testified that there were a large number of I.W.A. members there and a large number of the I.L.W.U. and Mr. Albright did the talking. Mr. Burtz had just arrived and you were present. Did Mr. Albright say anything in the nature of a

(Testimony of William H. Flint.)

request that the I.W.A. recognize this picket line or refuse to go through it?

Mr. Andersen: I object to that as leading and suggestive, may it please the Court.

The Court: Objection overruled.

A. Are you speaking now of the afternoon meeting of May 8 or the evening meeting of May 8?

Q. The evening meeting of May 8, the meeting at which a large number were present, the full meeting.

A. The large meeting of the I.W.A.?

Q. Yes. [367]

A. And only Mr. Albright as far as the International or Local 16.

Q. Mr. Burtz and Mr. Albright were present?

A. Yes.

Q. And Local 16 was not present?

A. That is right.

Q. What did Mr. Albright say on that subject?

A. I asked Mr. Albright if he wanted to give our Local a word of advice in this dispute or a speech. He explained the whole dispute to them as he saw it and in that week, when our members were just about ready to go back to work—some were ready to go back by themselves without Union approval——

Mr. Andersen: That is not the question. The question is what was said.

Q. What did Mr. Albright say?

A. He told all the members going back to work through the picket line was a bad idea because a

(Testimony of William H. Flint.)

Union man just didn't go through a picket line and if he did, ordinarily he wouldn't get work anywhere else, blackballs, more or less, by the Unions, and if they did work in the mill it would only be for a certain length of time because the lumber shipped from here would not be unloaded down below.

Mr. Banfield: That is all. [368]

Cross-Examination

By Mr. Andersen:

Q. Are you employed at the present time?

A. Yes, I am.

Q. By whom?

A. I am employed by the Juneau Spruce Corporation.

Q. What sort of work do you do there?

A. When the mill is operating I work as a band saw filer.

Q. My question is what do you do there?

A. That is what I do there when the mill is running.

Q. My question is what do you do there?

A. Right now I am an electrician's helper.

Q. Electrician's helper? A. That is right.

Q. What does your work consist of there now?

A. If they put in a motor I run a line over to the motor and make sure it runs right.

Q. Have you been working there as electrician's helper since October 11? A. No.

Q. You say the mill closed on October 11?

A. That is right.

(Testimony of William H. Flint.)

Q. During the time the mill operated, what did you do? A. I was a band saw filer.

Q. After the mill closed what was the next work that you did? [369]

A. We worked around the yard on moving lumber around and we built certain presses and put roofs on buildings.

Q. And how long did that take?

A. That took until about the first part of November, I would say.

Q. Then what did you do?

A. Then I was a millwright's helper.

Q. What did you do then, what kind of work is that?

A. It is a job where they repair the mill, the actual part which operates, and get it in shape to operate.

Q. How long did you do that work?

A. Until about the end of December.

Q. Then what did you do?

A. Then I became the—I worked with the electricians from then on.

Q. Electrician's helper? A. Yes.

Q. How many electricians are there?

A. One.

Q. You are his helper? A. Yes.

Q. Has your rate of pay been the same during all this time? A. That is right.

Q. What is your rate of pay?

A. \$1.70 per hour. [370]

(Testimony of William H. Flint.)

Q. What is the normal rate of pay for electrician's helper, if you know?

A. If you consider——

Q. Do you know the rate of pay for an electrician's helper?

A. Yes. It is not the same, though.

Q. What is it, less or more?

Mr. Banfield: If the Court please, I would like counsel to be more specific, state where the rate of pay is different.

Q. At the mill?

A. No; that is the rate of pay at that mill.

Q. \$1.70? A. \$1.70.

Q. What was the rate of pay of a band saw filer?

A. \$1.70.

Q. And that is \$1.70 too? A. Right.

Q. Do you know what the rate of pay for a band saw filer was generally in 1948?

A. Yes.

Q. What was it? A. \$1.70.

Q. And you are now being paid what?

A. \$1.70.

Q. Just what does an electrician do there when the mill isn't [371] working?

A. That is when he does all of his—all of the new construction work.

Q. Are you presently engaged in new construction work there? A. That is right.

Q. And for how long?

A. Since about the first of November, I imagine.

(Testimony of William H. Flint.)

Q. What is the construction work that is being done there?

A. We remodeled the whole saw mill as to how lumber flows through the mill.

Q. There was something the matter with the plant and it had to be remodeled?

A. Absolutely.

Q. What was the matter with it so that it had to be remodeled?

A. The lumber would get so far in the mill and it would start piling up and cause a bottleneck.

Q. It was so constructed they couldn't get enough lumber through it?

A. I don't know what you mean by "enough lumber."

Q. Not as much as they wanted, put it that way.

A. That is right; not as much as they wanted.

Q. In order to have a proper operation they had to close the mill this length of time in order to make all the changes you mentioned?

A. They wouldn't have had to; no. [372]

Q. What do you mean "they wouldn't have had to"?

A. For the simple reason they could make money with it like it was.

Q. But of course not as efficiently, is that what you mean to say? A. Not as efficiently.

Q. And they couldn't put out as much lumber; is that correct? A. That is right.

Q. And they decided to make all these changes

(Testimony of William H. Flint.)

so they could operate on an efficient basis; is that your understanding?

A. As long as the mill was shut they might as well make the changes.

Q. So it would work efficiently; is that true?

A. That is true.

Q. Who did you talk to about that?

A. All the bosses.

Q. Who, for instance?

A. There was a Mr. Harris, who is master mechanic, Mr. Shellenbarger, who is yard superintendent, and Mr. Johnson, sawmill superintendent.

Q. Did you talk to Mr. Johnson?

A. And Mr. Schultz, our Manager.

Q. Did you talk to Mr. Hawkins about it?

A. No; he isn't here.

Q. Did they tear out a lot of things Hawkins put in that [373] caused bottlenecks?

A. That is right.

Q. Mr. Hawkins had put in systems and things that caused bottlenecks which had to be ripped out in order to replace them according to Mr. Schultz's ideas so the mill could be operated efficiently; isn't that right?

A. Will you repeat that again, please?

Q. Will you read the question, Miss Reporter?

Court Reporter: "Mr. Hawkins had put in systems and things that caused bottlenecks which had to be ripped out in order to replace them according to Mr. Schultz's ideas so the mill could be operated efficiently; isn't that right?"

(Testimony of William H. Flint.)

Mr. Banfield: If the Court please, I object to this on three grounds. In the first place, no foundation has been laid that it is going to be material. It is another excursion such as he has made with all the witnesses that ends no place. In the second place, this man is not testifying as an expert on mill design or what creates bottlenecks, or how to run a sawmill, and there is no materiality apparent in this testimony. It is wholly incompetent, irrelevant and immaterial and not proper cross-examination. We did not ask that question of the witness or any questions about the efficiency of the plant or what is being done there now.

Mr. Andersen: May I make a speech too before the [374] Court rules?

The Court: I don't want any speeches made. If you have anything to say you can say it.

Mr. Andersen: I will be very happy to, your Honor. First, I want to find out what type of work this young man is doing there. Secondly, it goes to the interest of this particular witness, and third, finding out what he is doing there. He incidentally, uncovered it. I had no idea this was true, that the mill can't operate efficiently. Whether or not the mill operates efficiently is very important to this case. They testified they were going to put something like one million feet of lumber through and apparently, according to this man, they couldn't do it with the machinery installed by Mr. Hawkins, in order to do it efficiently.

(Testimony of William H. Flint.)

The Court: Objection sustained.

Q. With respect to this electrical helper——

A. Your Honor, counsel stated——

Mr. Andersen: Would your Honor tell the witness he is only to speak——

The Court: You can explain.

A. I would like to straighten out the record.

The Court: You want to explain some answer?

A. Counsel stated that I testified—I want to know if I am right or not—that I said that the mill couldn't run because Mr. Hawkins put in bottlenecks. Is that in the record? [375]

Mr. Andersen: He has no interest in the record. I think he shows he is an interested witness.

The Court: If you have any correction to make of your answer you may make it now. If you have in mind any answers you have made that you wish to correct you can correct it, or if you wish to explain any answer you may explain it, but that is as far as you can go.

A. I would say it was my assumption that Mr. Hawkins had put in bottlenecks.

Mr. Andersen: The witness has already answered the question. This is sort of a hind-sight or second thought. That is all.

Mr. Strayer: May the witness complete his explanation?

The Court: He made his explanation.

Mr. Andersen: I think he did.

Q. As part of your work as electrician's helper did you disconnect any equipment in there?

(Testimony of William H. Flint.)

A. Yes.

Q. Have you installed additional equipment?

A. Yes.

Q. And you say there is just one electrician and yourself working on the electrical work there?

A. I am the only one under the regular electrician.

Q. The two of you? [376]

A. Two of us; that is right.

Q. Do you work six days a week, five or four?

A. Six.

Q. And eight to five, or four, I assume?

A. To half past four.

Q. Whatever the hours are—by the way, are you still President of this Union? A. Yes.

Q. How many members are there in this Union at the present time?

A. Oh, we should have sixty men, although I can't say they are all members, having worked in the mill quite a few months, less than that in paying dues, but they do hold cards.

Q. Did you talk to anybody before coming to court about this case? A. No.

Q. You never talked to anybody about this case?

A. My wife.

Q. Haven't you talked to anybody about the case?

A. I have talked to several men about this case, but not material to this.

Q. You haven't discussed that with anybody?

(Testimony of William H. Flint.)

A. That is right; I have.

Mr. Andersen: Counsel came to the rescue.

Mr. Banfield: Counsel knows that no case is ever tried without talking to witnesses.

Mr. Andersen: He said twice he didn't talk.

Q. Haven't you talked in detail with these two gentlemen? A. Right.

Q. And talked with them for hours?

A. Not for hours.

Q. How long?

A. Maybe twice, a matter of a few minutes at a time.

Q. A few minutes each occasion? A. Yes.

Q. When was the first time?

A. The first time was perhaps a week ago maybe.

Q. When was the second occasion?

A. Yesterday.

Q. Before court?

A. Yesterday evening.

Q. So, of course, you did talk to them?

A. That is right.

Q. You said the first time that you didn't talk to anybody. A. You inferred——

Q. I didn't infer anything, Mr. Witness. I am just asking questions.

Mr. Strayer: I think the witness has a right to answer. [378]

The Court: The witness should be entitled to answer. If you wish to answer, you may do so.

Mr. Andersen: Of course.

(Testimony of William H. Flint.)

A. You inferred I talked directly before I came up here.

Q. I don't think I inferred anything. Is that your answer? A. That is my answer.

Q. Is that your full and complete answer?

A. Yes, as far as—I mean——

Q. I asked you if you discussed this case with anyone and you said "No." You know what the word "anyone" means, don't you?

A. That is right.

Q. That answer was wrong, wasn't it?

A. That is right.

Q. Yes; of course. By the way, you mentioned trips you took Outside; you took a trip to Portland?

A. That is right.

Q. How many trips to Portland?

A. Twice.

Q. When were they?

A. One in the latter part of May and one in October.

Q. Who paid for that trip, you personally?

A. On the May 1 trip?

Q. You said there was one in May?

A. By this Company, the Juneau Spruce. [379]

Q. Juneau Spruce? A. That is right.

Q. And you went down to Portland; how long were you there? I assume you went on business for the Juneau Spruce Corporation, as an electrician's helper? A. No.

Q. Who paid your expenses?

(Testimony of William H. Flint.)

A. The Juneau Spruce.

Q. You went on business for them?

A. No.

Q. Did Juneau Spruce pay your expenses?

A. Yes.

Q. Did they pay your wages while you were gone? A. No. I wasn't working then.

Q. In May? A. Right.

Q. Did you make a second trip? A. Yes.

Q. On business for the Company? A. No.

Q. It wasn't on business for the Company?

A. No.

Q. Who paid your expenses that time?

A. Our Union.

Q. Did the Company pay your wages while you were away? [380] A. No.

Q. You made a trip down there in July, didn't you? A. No.

Q. Were you in Portland on July 3?

A. No.

Q. Or were you in Portland on July 3 of 1948?

A. No.

Q. On July 3 did you on behalf of your Union sign any sort of a contract? A. Yes.

Q. Where did you sign it?

A. At the Juneau Spruce sawmill.

Q. In Juneau, Alaska?

A. In Juneau Alaska.

Q. And is that what is called a "Back to Work" Agreement? A. That is right.

(Testimony of William H. Flint.)

Q. Was that signed before or after your—that was signed after your first or second trip to Portland? A. The first trip.

Q. And was it before your second trip?

A. Yes.

Q. What was the date of this second trip to Portland?

A. October the ninth; I'm quite sure.

Q. October 9 of 1948? A. That is right.

Q. And you say on that trip your Union paid the expenses? A. That is right.

Q. Do you recall signing a "Back to Work" Agreement with the Juneau Spruce Corporation?

A. Yes.

Q. Do you recall what it said?

A. Quite a bit of it.

Q. Let me withdraw that for a moment. On October of 1948; or rather July 3, is that about the date you signed such an agreement?

A. As far as I recall it is the date.

Q. Have you a copy of it?

A. I have the copy in the Local files.

Q. Have you seen it lately?

A. I believe I have, within the last month.

Q. Have you read it? A. Yes.

Q. Did you turn it over to counsel?

A. No; I believe counsel could have got one from the Juneau Spruce Corporation.

Q. Why do you say you "believe" that?

A. Naturally if I got one, the Company also got one.

(Testimony of William H. Flint.)

Q. You say you "believe" counsel got it from Juneau Spruce Company?

A. I said if they wanted they could have got it from the [382] Juneau Spruce Corporation.

Q. You didn't supply them one then?

A. No.

Q. The contract memorandum of July 3, 1948, entered into followed the agreement of November 3, isn't that true? A. True.

Q. I assume you didn't have anything to do about the negotiations of November 3, as you weren't an official of the Local then?

A. No.

Q. And you were sort of fresh into the Union, is that right? A. Right.

Q. Some question came up about a question of the agreement of November 3, about if it referred to barge loading?

A. That would be hearsay.

Q. Would it be—let your lawyers—

The Court: You should answer the question regardless of whether counsel—

Mr. Strayer: I am not clear from the question if it was when the contract was negotiated or if it came up later on. I think counsel should make that clear.

Q. After the agreement of November 3, 1947—by the way, have you read the agreement of November 3, 1947? A. What was that again?

Q. Have you ever read the agreement of November 3, 1947? [383] A. Several times.

(Testimony of William H. Flint.)

Q. You are familiar with it then, aren't you?

A. Yes.

Q. Sometime between November 3, 1947, and July 3, 1948—of course the strike had occurred or lock out—or——

A. You say——

Q. Whatever you want to call it, sometime between November 3, 1947, and July 3, 1948; isn't that true?

A. Yes.

Q. Somewhere during that period and sometime prior to July 3 the question was raised as to whether the agreement of November 3 had anything to do with barge loading; isn't that true?

A. That is right.

Q. Your Union wasn't certain whether the contract applied to barge loading or not, was it?

A. That is right.

Q. On or about July 3 you had a meeting with the Company—by the way, with whom did you discuss it in July, with the Company, what man in the Company did you discuss it with?

A. Mr. Schultz.

Q. He is the President of the Company?

A. No; he is Manager of this local sawmill.

Q. He is in court now?

A. That is right.

Q. You wanted to straighten out what the contract referred to regarding barge loading because the Union was under the impression it didn't include barge loading; isn't that true?

A. I wouldn't say "under the impression."

Q. That idea; put it that way.

(Testimony of William H. Flint.)

A. Up until July 3 they weren't sure.

Q. Not certain, and the Union's position was that the contract of the third really didn't cover barge loading, so everybody wanted to have an understanding; is that correct? A. No.

Q. Let's put it this way: You said "No" Let's put it this way; of course if the contract had been clear on the question there wouldn't have been any necessity for a discussion of that problem with the Company, would there?

A. It was clear in our minds.

Q. It was clear in your minds but it wasn't clear in the Company's mind?

A. Not in a third party's mind.

Q. Who was that, Local 16?

A. That is right.

Q. Then you did discuss your contract then with Local 16? A. Many times.

Q. With whom did you discuss it?

A. They always had different men. Groups came to see all of [385] us. I imagine during the course of time all the members came in.

Q. Was there any one occasion when you discussed it?

A. On the eighth day of May when we had a meeting, Burtz and Albright and Local 16.

Q. Did you discuss the terms of Exhibit 2 at that time with Mr. Albright?

A. Our contract? Exhibit 2?

Q. Yes.

(Testimony of William H. Flint.)

A. Yes; we discussed the terms of the contract, too.

Q. You discussed the terms of the contract. Was there any discussion about the language of the contract in so far as it may have related to barge loading? A. Yes.

Q. That, of course, was before July 3, wasn't it?

A. It was.

Q. This agreement of July 3 is what is usually called a "Back to Work" Agreement, isn't it?

A. That is right.

Q. In which you agreed to go through the picket lines; isn't that true? A. That is right.

Q. You say there was some question in a third party's mind. Did you ever show that before it, the July 3 agreement, was signed, to any of the Local 16 men? [386] A. No, I didn't.

Q. Because you considered it none of their business? A. That is right.

Q. This contract was made solely between you and the Company; that is, your Union and the Company, isn't that true? A. That is right.

Q. You stated it was none of the Union's business? A. That is right.

Q. In that agreement of about July 3, was there any wording in that general agreement to the general effect that your Union claimed the jurisdiction of all work performed by all the employees of the Juneau Spruce Corporation, according to the contract, and also the loading of barges?

(Testimony of William H. Flint.)

Mr. Strayer: Your Honor, may the witness see the contract?

The Court: Yes.

Mr. Andersen: I am just asking the question, if that is in it.

The Court: Before the witness can be questioned about a writing, the rule here is that the writing has to be shown to him.

Mr. Andersen: At this point it is not necessary. I am just asking him his recollection of what the document contained.

The Court: I thought you were reading from it.

Mr. Andersen: Maybe I am, your Honor. I have the document right in front of me. I don't believe at this point I have to do it.

The Court: The local statute requires that before a witness shall be questioned regarding the contents of something in writing, that the writing has to be shown to him.

Mr. Andersen: Does your Honor want me to follow that procedure?

The Court: Yes.

Mr. Andersen: I will be glad to comply. You have seen this, counsel?

Mr. Strayer: Yes.

Mr. Banfield: I would like to have that last question read back, please, to see exactly what it was.

Q. Does this document refresh your memory?

A. Yes.

(Testimony of William H. Flint.)

Mr. Banfield: I would like to have the question read back, the previous question.

Court Reporter: "In that agreement of about July 3, was there any wording in that general agreement to the general effect that your Union claimed the jurisdiction of all work performed by all the employees of the Juneau Spruce Corporation, according to the contract, and also the loading of barges?"

Q. Was there? [398] A. Yes.

Q. In other words, this was sort of intended as a supplement to your agreement of November 3 to clear up who would handle the barges; is that the general idea? A. No.

Q. By the way, who drew this? Did you or somebody else draw it? A. I drew it.

Q. Is this your language?

A. That is my own language.

Q. Where did you draw the original?

A. At my home.

Q. By the way, I believe this should be marked for identification.

The Court: It may be so marked, Defendant's Exhibit B. (For identification.)

Q. You are sure this Exhibit B that I have here wasn't drawn in Portland?

A. Absolutely not.

Mr. Strayer: I think if counsel is going to continue to question from it, I think it should be put in evidence and read to the jury. I request that at this time.

(Testimony of William H. Flint.)

The Court: I suppose you intend to offer it, but by some other witness, but if you have no——

Mr. Andersen: I will offer it at the appropriate time. [389]

Mr. Strayer: Then we offer it at this time as Plaintiff's Exhibit.

Mr. Andersen: It was offered for identification. There is no objection to counsel offering it, I guess.

The Court: It will be admitted then.

Mr. Strayer: Will you read it, Mr. Andersen, or shall we?

Mr. Andersen: We will take care of things.

Mr. Strayer: I will ask the Court for the privilege of reading the exhibit at this time.

Mr. Andersen: May I ask the privilege of continuing my own examination?

The Court: I think it can be deferred until re-direct examination.

Clerk of the Court: The exhibit has been marked Plaintiff's Exhibit No. 7.

Q. Now, I understand you testified that before the strike or lock out, whichever term may be used, at least before April 10 of 1948, that there were meetings of Local 271, your Union, where the question of barge loading, the jurisdiction of longshoremen and your jurisdiction was discussed; is that true? A. That is right.

Q. And on or about April 1, your Union prepared a resolution [390] of some kind or a motion regarding this question?

(Testimony of William H. Flint.)

A. A motion; that is right.

Q. And you were there at that meeting, weren't you?

A. That is right.

Q. Was that motion to the general effect that the work belonged to the longshoremen?

A. No.

Q. It wasn't?

A. No.

Q. Nothing like that was said?

A. Something like that was said.

Q. Was that the sense of the motion, that the work belonged to the longshoremen?

A. It was in respect to their jurisdiction.

Q. In other words, you didn't say the work belonged to the longshoremen?

A. No.

Q. Is this in your handwriting?

A. Yes.

Q. I will offer it.

Mr. Strayer: It has not been identified.

Mr. Andersen: It was marked for identification. We will take care of details.

The Court: As to this particular exhibit, it was undisputed that it was a memorandum or minutes of what occurred [391] at this meeting.

Mr. Strayer: It was not made by this witness, and the previous witness said he was not at the meeting, and counsel asked if he was testifying from hearsay, and he said "Yes."

Mr. Andersen: This witness testified it was in his handwriting.

Mr. Strayer: He doesn't testify that it was made at the meeting and I challenge counsel to have him do so.

(Testimony of William H. Flint.)

Mr. Andersen: I don't see what good it could do him to challenge a lawyer in the courtroom.

Q. This document you say is in your handwriting?
A. My handwriting.

Q. That is the whole page? Not what appears to be marks of the Court.

A. Yes; the whole page.

Q. And when did you write these?

A. I copied those from the minute books of our Local Union on about—sometime in the month of May, 1948.

Q. And this, in other words as I understand it, is in your minute book, your Union's minute book?

A. The man who takes care of the minutes, the officer elected to take care of them, the Secretary of the Union.

Q. You didn't take care of that in April of 1948?
A. No. [392]

Q. But when you wanted to find out what the motion on the floor in discussion was, you went to the minute book; you wanted to see as to what occurred in the Union meeting April 1?

A. I was asked to copy the minutes from our book, which I did.

Q. Who asked you?

A. Our lawyer at that time.

Q. Your lawyer asked you to get a copy of those minutes?
A. Yes.

Mr. Andersen: May I read this to the jury? I will offer it in evidence at this time.

(Testimony of William H. Flint.)

Mr. Banfield: I object. It has not been identified to show who made it and how it came to be in the minute book and whether it reflects what happened. Anybody could put that in the minute book. There is no signature; no nothing.

Q. As I understand you, you got this from the minute book? A. Yes.

Q. They are excerpts that were requested by Mr. Banfield, is that correct?

A. No; he wasn't our lawyer.

Q. You mentioned "our lawyer."

A. Our lawyer—he is not our lawyer. He is the Company's lawyer.

Q. You personally as President of the Union copied it out of the official minute book of the Union; is that correct? [393] A. Correct.

Q. And whomsoever your lawyer was, you gave it to him as a true excerpt from the minute book of the Union; right? A. Correct.

Q. Did you say—of course, you copied it—you would say it is a true copy? A. It is.

Mr. Andersen: I think probably, your Honor, the only objection available would be that it is not the best evidence. This is a certified copy.

Mr. Strayer: We don't make that objection.

Mr. Andersen: Then I will offer it.

Mr. Strayer: The objection we make is that there is no evidence that it correctly reflects what happened at the meeting.

The Court: The objection was made before and

(Testimony of William H. Flint.)

will have to be sustained on that ground, unless this witness can testify that the record was made under his supervision and he knows that it was correctly made and recognizes the signature of the person.

Q. If I understand your testimony, you have a man in the Union that is an officer in the Union whose duty it is to take minutes?

A. That is right.

Q. His duty in taking minutes is to correctly take motions [394] and actions on motions taken at the Union meetings; is that correct?

A. Correct.

Q. And he is supposed to note this down into the book for that purpose? A. Correct.

Q. You know his handwriting, don't you?

A. No; I wouldn't say I know his handwriting now.

Q. At the time you made this excerpt?

A. I was quite sure it was his. It was in the minute book, and he had the minute book.

Q. Where did you get the minute book, from him?

A. Our books are all kept in a locker at the Hall.

Q. When you went to get the minute book you recognized it as the official minute book of the Union? A. Yes.

Q. Did this person happen to be there?

A. No.

Q. But you recognized it and his writing?

A. That is right.

(Testimony of William H. Flint.)

Q. And then you copied it?

A. That is right.

Q. And that minute book is under the control of the Union—your control as President, his control as Secretary?

A. Not when those were written it was not under my control. [395] At the time I got them they were under my control.

Mr. Andersen: I think we have laid a sufficient foundation.

The Court: He hasn't testified the record was correct at the time he made the copy.

Mr. Andersen: I think it is the record of an organization. I don't believe—we don't have to go into that question at this particular point.

The Court: When would it be gone into?

Mr. Andersen: On my further examination. This is apparently an official record of the Union.

The Court: You want it merely marked for identification?

Mr. Andersen: I want to offer it in evidence, may it please the Court. It has already been marked as Defendant's Exhibit A for identification. I would like to offer it as Defendant's Exhibit A in evidence, may it please the Court.

The Court: It has got to be shown by this witness or somebody else that the record of which that purports to be a copy was made by somebody whose duty it was to make it in the course of the organization.

(Testimony of William H. Flint.)

Mr. Andersen: He has testified to that.

The Court: He hasn't testified that he knew it was correct at the time it was made. That is the objection.

Mr. Andersen: You mean when he copied it, he copied [396] it correctly?

The Court: He would have to know that the original record from which he was making a copy was a correct copy.

Mr. Andersen: If that would be true, then any time that the man who wrote the minutes of a lodge died, the minutes themselves being the official record, would never be admissible in any court; the person having been deceased couldn't testify.

The Court: Before records are admissible, it has to be shown that they were made by the person who made them in the regular course of business and that it was his regular course of business to make them or that they were made under his supervision by someone under him and that he knows the record is correct. If that were not made under those circumstances then he would have to be able to testify that the record is not only correct, but that he recognizes the handwriting of the person who made it.

Mr. Andersen: I think it is admissible, but the witness can say whether it is correct or not after it is in evidence. May it please the Court, I think that goes to the weight of the document rather than——

The Court: Not so much what it relates is cor-

(Testimony of William H. Flint.)

rect, but whether the person who made the record made a correct record, and whether he knows it is a correct record.

Mr. Andersen: I will see if I can develop that, your [397] Honor.

Q. I assume the Secretary of your Local is instructed to take down correct records, isn't that true? A. He is instructed to do that.

Q. He does, doesn't he; so far as you know?

A. No.

Q. Oh, he doesn't? Then I direct your attention to that document and you say that is entirely incorrect, don't you?

A. No, I don't say that it is entirely incorrect.

Q. Is it correct?

A. No, it is not, sir. Parts of it are correct.

Q. Let me have it then. At the top it says, "Special Meeting, April 1, 19—" I think that is 1948. Then it says, "Discussion between Labor Committee of I.L.W.U. and those attending meeting relative to loading of barges and ships." Is that correct? Was it on April 1? A. Yes.

Q. It was in 1948? A. Yes.

Q. It was a special meeting?

A. That I could not swear to. I imagine it was.

Mr. Strayer: I make the objection that obviously counsel cannot do by indirection what he cannot do by direction. [398]

The Court: Objection sustained.

Q. Let's refer to the second meeting there of April 9, 1948, that has been mentioned. Is that a

(Testimony of William H. Flint.)

correct excerpt from the minutes, or incorrect?

A. That is the minutes of April 9?

Mr. Paul: Just a moment please.

Mr. Strayer: Just a second.

A. These minutes of April 9 are not minutes of a Local M-271 meeting.

Q. They are not? Are they in your handwriting?

A. They are in our book and I copied them.

Q. Is this document also in your handwriting?

A. Yes.

Q. When you state it isn't true, do I understand that it is correct as far as it goes but that there is additional matter that should be there?

A. Not exactly that. I said the motion on April 1 ought to be reworded correctly and that the meeting of April 9 was not a meeting of our Local.

Q. What local does this special meeting of April 9 refer to?

A. That is all the employees of the Juneau Spruce Corporation.

Q. All of the employees?

A. That is right.

Q. April 1 is of the Local?

A. That is right. [399]

Q. And the one of the special meeting of the ninth was a meeting of all the employees, is that correct?

A. That is right.

Q. With respect to this motion of April 9, April

(Testimony of William H. Flint.)

1, rather, was a "motion made and seconded to go on record to not load barges. We figure this work"——

Mr. Strayer: Just a moment. Your Honor, counsel is again now doing by indirection what he was refused permission to do. I don't want to be captious and Mr. Banfield doesn't either; if counsel insists, we can withdraw the objection and he can read it in evidence.

The Court: Who has the custody?

Mr. Andersen: They are not making the best evidence objection. They waived that objection. That is why I think it is clearly admissible.

The Court: But I have to pass on any objection that may occur to me on passing on the admissibility of something. I am wondering, if the person who is custodian of the original record——

Mr. Andersen: They have waived that.

Mr. Banfield: We will stipulate that it may be put in the record.

Mr. Andersen: That is fine.

Mr. Banfield: That is fine; sure.

The Court: I thought the objection you made a moment [400] ago, when I was about to admit it, was that it wasn't correct. If you want to waive that objection, why the Court has no objection.

Mr. Banfield: We have the privilege of cross-examining to show whether or not it is correct.

Mr. Andersen: That is why trials take so long. May I read this?

(Testimony of William H. Flint.)

The Court: Yes.

Mr. Andersen: "Special Meeting, April 1, 1948. Discussion between Labor Committee of I.L.W.U. and those attending meeting, relative to loading of barges and ships. Motion made and seconded to go on record to not load barges. We figure this work belongs to the longshoremen. By a written vote—thirteen members present—unanimous."

Q. I understand that was a regular meeting, rather a special meeting, of Local 271?

A. Right.

Q. And then the following week, April 9, you held a meeting also, didn't you? A. April 9.

Mr. Strayer: Pardon me, Mr. Andersen. May I have that exhibit number?

Mr. Andersen: It is Exhibit A.

Clerk of the Court: Yes, sir. The exhibit has been so marked. [401]

Q. On April 9 you held another special meeting? A. Well, the Local didn't; no.

Q. You used the minute book of the Local to record the minutes? A. I didn't.

Q. An official of your Local did?

A. He did at that time; yes.

Q. You threw the meeting open to all employees of the Juneau Spruce, is that correct? A. No.

Q. Where was it held? A. At the C.I.O.

Q. You usually hold your meetings there?

A. That is right.

Q. And the minute book is kept there?

(Testimony of William H. Flint.)

A. That is right.

Q. What percentage of the people at the meeting were sawmill workers and eligible for membership?

A. I think—and hope—all of them were.

Q. And you hope so? A. Yes.

Q. The question up for discussion—I will read the exhibit. “Special Meeting, April 9, 1948. Discussion on conditions relative to I.L.W.U. loading barges. Move made and seconded to take vote on whether to cross picket line—again [402] a unanimous vote to honor picket line of I.L.W.U.” About how many were present at that meeting?

A. I would say 180 in the Hall. Who they were I don’t know.

Q. You said they were all eligible for membership in your Union?

A. They would have been eligible if they wanted to join.

Q. And you only let sawmill workers join your Union, don’t you A. That is right.

Q. Did you have meetings after that and until July 3? A. You mean of our Local?

Q. Yes. A. Yes.

Q. And with respect to Exhibit 7 for the Plaintiff, which is dated July 3, you signed that in Juneau as you stated, but where?

A. At the Juneau Spruce Corporation office.

Q. Were you alone at the time? A. No.

Q. Who attended you there?

(Testimony of William H. Flint.)

A. All the rest of the members. The names are on that piece of paper; if it is a true document, they are.

Q. You mean——

A. Five members, Rufus Chaney, Paul R. Beierly——

Q. Who was Rufus Chaney? [403]

A. A man who worked for our sawmill, a member of our Union.

Q. Who is George Converse?

A. He also works for the sawmill.

Q. Who is Paul R. Beierly?

A. He works for the sawmill.

Q. Who is Edward Hughes?

A. Vice President of the Local.

Q. They all were there with you, is that correct, and Mr. Schultz signed on behalf of the Company? A. That is right.

Q. I assume the Union had a discussion of this just before this, is that correct?

A. It was discussed at a meeting before, the night before at a meeting.

Q. The night before that, and you wanted to clarify it; that is why it was drawn up and brought down? A. That is right.

Q. When this Exhibit 7, Plaintiff's Exhibit 7, was drawn, of course there was a discussion in relation to your contract, that is the contract of November 3? A. I don't understand your question.

Q. When you drew this document which is Plain-

(Testimony of William H. Flint.)

tiff's Exhibit No. 7, I assume there was some discussion about the document in relation to Plaintiff's Exhibit 2, which is your Collective Bargaining Agreement? [404]

A. That is right.

Q. You wanted to clarify things, too, didn't you?

A. Clarify?

Q. Between you and the Company.

A. I wanted it clarified; that is right.

Mr. Andersen: Now, may I read this, your Honor?

The Court: It is an exhibit, isn't it?

Mr. Andersen: Yes.

The Court: Yes.

Mr. Andersen: Thank you. "July 3, 1948. Local M-271 International Woodworkers of America, C.I.O., agrees to cross the picket line established by Local 16, I.L.W.U. and claim jurisdiction of all work performed by employees of the Juneau Spruce Corporation according to our contract, also the loading of company owned or leased barges with company owned gear as stated in the Corporation's letter signed by E. H. Card and addressed to Virgil Burtz. The Juneau Spruce Corporation will hire all members of Local M-271 formerly employed by the company at the time the picket line was established according to seniority needed for the efficient operation of the plant on a single shift basis. The Juneau Spruce Corporation further agrees to file no charges against any member of Local M-271 or against the union as an organization, or to dis-

(Testimony of William H. Flint.)

criminate against any member for refusing to cross the picket line. The company agrees to open negotiations on [405] "a wage scale for all job classifications including barge loading comparable to rates in the states plus 10c per hour for Alaska retroactive to April 1, 1948."

Q. And it was sometime after that agreement was signed that you all returned to work; is that correct? A. That is correct.

Q. On this meeting of April 1 that you talked about I understand that a Committee of Local 16 came and talked to you, or was it before the meeting?

A. You are referring to the meeting of April 1?

Q. Yes. A. That is right.

Q. And for the purpose of this cross-examination the names Guy, Wheat and Burgo came there and talked? A. Yes.

Q. Talked with you, or all of you, or just a Committee of you?

A. With all of us at the meeting.

Q. Before the meeting?

A. Before the meeting.

Q. And how long were they there about?

A. I will say about a half an hour.

Q. And I guess you knew these fellows, didn't you, or were they strangers?

A. I knew some of them.

Q. I assume they told you in effect, as a matter of fact, [406] showed you, pay stubs for work they had done for Juneau Spruce?

(Testimony of William H. Flint.)

A. Pay stubs; that is right.

Q. They told your Union they had been doing this work for many years at the Juneau Lumber before the Juneau Spruce took over; isn't that correct?

A. That is right.

Q. They told you, as you said before, that they had a contract with the Juneau Lumber?

A. Yes.

Q. They told you that?

A. That is right.

Q. And that it was their opinion that that contract carried over; isn't that true?

A. Right.

Q. And that the contract carried over and hired longshoremen in the same way it always hired longshoremen; that is true, too, is it?

A. That is right.

Q. By virtue of those circumstances, they didn't want to see any claims for work come in conflict between your two Unions, and wanted to work everything out nicely and decently and without any trouble, isn't that true?

A. Right.

Q. They came to give you all the facts. [407]

A. That is right.

Q. And after they gave you the facts they left?

A. That is right.

Q. And after they left your Union voted, in effect, that the work belonged to the longshoremen and you would respect them?

A. No.

Q. Did your Union vote?

A. Yes.

Q. Did your Union vote for the longshoremen to get that work?

(Testimony of William H. Flint.)

A. I can't answer "Yes" or "No."

Q. You can't answer "Yes" or "No"? Is it "cannot" or "don't want to"?

A. I want to.

Q. Suppose you answer "Yes" or "No" and as the Court stated, you have a perfect right to explain your answer, or is it impossible to answer the question?

A. I would like to state the motion, and then state yes or no.

Q. Suppose you answer the question first and then explain it.

A. If I am allowed afterward to explain——

Q. The Judge told you you could explain.

Mr. Banfield: First, would you read the question?

Mr. Andersen: Yes. Would you read the question?

Court Reporter: "Did your Union vote for the longshoremen [408] to get that work?"

A. Yes.

Q. Your answer is "Yes"?

A. Yes.

Q. Now you may explain.

A. We voted that we would respect the jurisdiction of the longshore Union until we knew who it actually belonged to, or words to that effect.

Q. Or words to that effect?

A. I can't quote it exactly.

Q. Now, does your Union follow the usual prac-

(Testimony of William H. Flint.)

tice of having a man to read the previous minutes?

A. We usually do.

Q. At the meeting of April 9, the minutes of April 1 were read?

A. I can't recall. I was not President at that time.

Q. You weren't there?

A. I was there, but I was not President at that time.

Q. Is it usually the custom every time you have a meeting to read the minutes? A. Yes.

Q. So far as you know, it was that night?

A. I imagine—I couldn't swear to it.

Q. Then they asked for corrections, omissions or additions? A. That is right. [409]

Q. And so far as you know, none were made at the meeting of April 9, no suggested changes to the minutes of April 1 were made?

A. No, they weren't.

Q. The minutes stood as read? A. Yes.

Q. They stood as recorded—unchanged, uncorrected, uncriticized—is that correct?

A. On the meeting of April 9?

Q. Let me put it again. On the meeting of April 9, following your usual procedure, the minutes of April 1 were read and no corrections were offered or made?

A. On that question, seeing it was not a meeting of our Local, I doubt very much if they were read. They may have been.

(Testimony of William H. Flint.)

Q. It was usually the practice?

A. It was usually the practice, if it was a meeting of the Local.

Q. When you went down to copy the minutes, as you have indicated, did you observe whether any changes had been made?

A. I copied them as they were.

Q. And didn't make any changes?

A. No.

Q. And didn't see any changes? A. No.

Q. When you took this vote, as you put it—I assume after the [410] longshoremen came up there and told you how they felt about this thing, that you fellows who were in there talked about it, and talked about it, I understand, for quite some time, about an hour, as I recall your testimony, before the vote? A. Before the vote; that is right.

Q. An hour or longer?

A. I would say about a half hour or an hour. I am not sure which.

Q. Did everybody in your Local have an opportunity to express themselves?

A. The members that were there.

Q. Everybody has the right to attend the meeting, all the members? A. Yes.

Q. So all the members expressed themselves after the longshoremen left? A. Yes.

Q. And then a vote was taken; is that true?

A. That is right.

Q. By the way, when the longshoremen from

(Testimony of William H. Flint.)

Local 16 met with you that evening, who was the spokesman—if you recall that they had a spokesman?

A. Yes. I couldn't remember it this morning. He was an old fellow in the gang and isn't here now. [411]

Q. You haven't seen him today?

A. No; not for months.

Q. In that conversation was there any reference to your own Constitution; that is, to the I.W.A.?

A. That is right.

Q. About the normal jurisdiction of the I.W.A.?

A. That is right.

Q. And they told you that loading boats and barges is usually and traditionally longshore work?

A. Right.

Q. And they wanted to do it and thought they had a right to; is that the substance of it?

A. Right.

Q. That is on April 1. They didn't say they were or were not going to put up a picket line?

A. Yes, they did.

Q. What did they say?

A. That they were going to the Company to see if they could get the work and if they couldn't they would put up a picket line so they could get the work.

Q. After this your Union, in effect, asked the Company to turn the work over to the longshoremen, didn't you?

(Testimony of William H. Flint.)

A. We sent a man with the Longshore Committee.

Q. Do you know the name of the man?

A. Gordon Peterson. [412]

Q. And was he officially representing your Union so far as you know?

A. As far as I know he was.

Q. Did he occupy any position in the Union?

A. Secretary.

Q. And did you attend the meeting with the Company? A. No.

Q. Well, before he went down there the Union had taken appropriate steps to advise the Company that so far as the I.W.A. was concerned, that is, Local 271, you fellows were perfectly pleased and contented to let the longshoremen do this work because it was traditionally longshore work anyway; isn't that true?

A. I couldn't swear to that, but I think a letter was written by the Secretary to the Company and advised them of the action of the meeting.

Q. What meeting are you referring to?

A. April 1

Q. April 1? A. April 1.

Q. You think a letter was written to the Company? A. I think so.

Q. As President of the Union did you see the letter?

A. I was not President at that time.

Q. In 1948? [413] A. That is right.

(Testimony of William H. Flint.)

Q. When did you become President?

A. I became President on the evening of the tenth of April about eight o'clock.

Q. That is after the second meeting then?

A. That is right.

Q. Were you—did you attend the meeting when that letter was authorized?

A. That I can't recall, if it was ever authorized or not. All I think is I think I have seen a copy in the file of a record like that, but I think there was.

Q. The general idea was that the Union passed a motion to advise the Company that M-271 wasn't interested in doing the work and they could turn it over to the longshoremen. Is that the sense of it, is that true? A. Yes.

Q. You fellows would have been perfectly content if this Plaintiff's Exhibit 2 would be modified to that effect; that was the idea, was it?

A. I could answer that "Yes" or "No." I don't want to. It might influence the jury, if I answered it "Yes" or "No."

Q. You might influence the jury? You can answer "Yes" or "No." The Judge won't mind.

The Court: Answer "Yes" or "No" and you can explain the answer. [414]

A. I will answer yes, and also I have the right to explain.

Q. Yes, you have.

A. We made that answer "Yes" for the simple

(Testimony of William H. Flint.)

reason that this is a small town. We are both C.I.O. Locals, and the barge loading is a very small percentage of our work.

Q. Too small to bother about?

A. Actually it is.

Mr. Strayer: I would like to have the witness make his answer without interruption.

A. As long as it was that small, to avoid fighting and keep the sawmill going ahead—that was the only reason we gave up our work. We did not know—but we gave it up to keep going and furnish the men work who had not worked all winter long. That is why we gave up our jurisdiction.

Q. So, as I say, you were perfectly willing to modify this contract? A. That is right.

Q. And you were perfectly willing to send them a letter, or did send them a letter, telling them they could modify it and let the longshoremen do the work without objection from your Union?

A. Correct.

Q. You say that was a very small portion of the work there, this barge loading was too small to bother about?

A. It is, and still is as far as we are concerned. [415]

Q. And still is?

A. What I mean is, there were eight men or six men involved in barge loading, whatever it is, I am not sure, and there were one hundred men down there working. A small percentage of the employees were barge loaders.

(Testimony of William H. Flint.)

Q. We went into that yesterday. For your information, it wouldn't amount to much more than \$5,000 a year. That would be about your idea, would it?

A. I wouldn't know in terms of money.

Q. All right. After that letter was sent to the Company, did you receive a reply to that letter? Do you know? You were President by that time, I assume.

A. I don't know what you mean "by that time"?

Q. Well, after Mr. Peterson—strike that please. Do you recall the date Mr. Peterson went down to the mill? A. No.

Q. Was it after the meeting of April 9?

A. I don't hardly think so, because the picket line was up next morning.

Q. Was it between April 1 and April 9?

A. I imagine it was, that he went down there.

Q. Do you know if your Local received a reply to that letter?

A. I don't know. I don't think they did.

Q. You don't think the Company replied to it?

A. I don't know. I am not sure. [416]

Q. Did you have any conversation with officers of the Company to switch this work to the long-shoremen for peace in Juneau? A. Yes.

Q. Who did you talk to?

A. Mr. Hawkins and Mr. E. H. Card.

Q. How many times did you discuss this problem with them?

(Testimony of William H. Flint.)

A. I would say perhaps three or four times.

Q. They refused to follow the suggestions in your letter, did they? A. Yes.

Q. And these three or four different times you talked to them? A. Yes.

Q. Just to go back to one other matter, as I understand it the longshoremen came to see your Union on April 1 and told you they had had this contract with the Juneau Lumber Mills and that they had been paid and showed you time slips, etc.; that is true, isn't it?

A. They showed us withholding slips.

Q. Did they tell you how long they had had that contract with the Juneau Lumber?

A. That I am not positive about. It seems like they said they had been certified in 1938 by the National Labor Relations Board for all types of longshore work in Alaska. [417] Now, I am not positive about that either. I think that is what they said.

Q. Let's not "think."

A. You asked me, and I said I am not sure.

Q. I don't want guesswork. You don't know whether they said it or not?

A. It is all guesswork.

Q. Let's not have any guesswork. Do you remember how long they told you they had the contract? A. No.

Q. Do you recall whether they told you it was for general longshore work?

(Testimony of William H. Flint.)

A. They said it was for loading all the lumber products of the Juneau Spruce Corporation.

Q. They told you they did longshore work up and down the Coast, didn't they? A. Yes.

Q. By the way, did you know Mr. Rutherford? A. Yes.

Q. Did you know who he was? A. Yes.

Q. How long have you known Mr. Rutherford?

A. I worked one month for Mr. Rutherford when he was here.

Q. Do you know when he left?

A. I think he left sometime about May, 1947; June, maybe. [418]

Q. Are you sure he left before June?

A. I am not sure.

Q. You worked for him a month; when?

A. From the first of April to the first of May, when this Company took over.

Q. During that particular period, did you know him, personally, I mean?

A. No; I knew who he was.

Q. Did you go to him and, as head of the Juneau Lumber Mills, ask whether they ever had a contract with the longshoremen?

Mr. Strayer: What time?

Q. Any time, did you ever ask Mr. Rutherford if his Company had a contract with the longshoremen for the longshore work?

Mr. Strayer: I object.

A. He left here before I came into the Union.

(Testimony of William H. Flint.)

The Court: Don't answer.

Mr. Strayer: I object. It doesn't make any difference.

Mr. Andersen: Counsel misapprehends what I had in mind. He says he made an investigation to find out if there ever was such a contract. He said he knew Mr. Rutherford. I asked him if he asked Mr. Rutherford.

Mr. Strayer: A contract with the Juneau Spruce, not [419] the Juneau Lumber.

Mr. Andersen: Not the Juneau Spruce; the Juneau Lumber.

Mr. Strayer: It is immaterial.

The Court: As counsel pointed out on direct he testified to having made an investigation or at least by his Union, I don't know if he participated in it, and that was one of the things they investigated, if I recall correctly.

Mr. Andersen: That is why I asked the question.

Mr. Strayer: As I understand the testimony was that representation was made to them that the longshoremen had a contract with the Juneau Lumber and that it had carried over to the new Company which had taken over. My objection is upon the ground that it doesn't make any difference whether there was, in fact, a contract between the longshoremen and the Juneau Lumber. The question is, was any contractual relation binding on the Juneau Spruce Corporation.

Mr. Andersen: Counsel, not intentionally, of course, misquoted the record. I asked the witness

(Testimony of William H. Flint.)

a short time ago what the longshoremen stated. The witness stated that the longshoremen came to the Union and said that for years they had a contract with the Juneau Lumber Mills and had always done that work and in their opinion it carried on to the Juneau Spruce, and they carried on under the old contract. The witness said "Yes, that is what they said." Now, I asked [420] if he asked Mr. Rutherford, the former President—as far as I know he was the President of the Juneau Lumber—whether he asked Mr. Rutherford whether there ever was such a contract.

The Court: Objection overruled.

Q. Did you, sir? A. I did not.

Q. Were you on this investigation committee?

A. When I said investigation——

Q. Just answer my question. Were you on this investigation committee?

A. Actually, there was not an investigation committee.

Q. There wasn't an investigation committee? Well, maybe I am wrong. In my notes—but you say the I.W.A. made an investigation. Do you know who made the investigation?

A. Who made it? All of us. No one was elected to any investigating committee or were appointed to any investigating committee.

Q. The Union didn't do it officially—everybody did it? Is that what you mean to say?

A. Investigating? The committee wasn't for

(Testimony of William H. Flint.)

that purpose, but there was a Negotiation Committee which negotiated with the longshoremen.

Q. You say "nobody was appointed, everybody did it on their own." Which do you mean?

A. Well, the Negotiation Committee was trying to settle the [421] dispute and took it upon themselves to find out.

Q. Were you a member of the Committee?

A. Yes.

Q. Tell me what you did to find out whether there was any such contract with the Juneau Lumber.

A. I asked Local 16 and Mr. Albright to show us the contract where it showed they had that work. They never did.

Q. You asked them to show you a contract between the Juneau Lumber and the longshoremen?

A. That is right.

Q. Did you go to the Waterfront Employees, or is it the Dock Employers?

A. Something like that.

Q. Did you go to them? A. No.

Q. Did you go and ask the Company whether its predecessor Company had a labor contract regarding longshoremen?

A. No; I asked the longshoremen that.

Q. You didn't go to the Company and ask them, you didn't ask the Juneau Spruce if they knew whether the Juneau Lumber ever had a contract with the longshoremen?

(Testimony of William H. Flint.)

A. I didn't anyway.

Q. All you did then was ask the longshoremen, is that correct? A. Right.

Q. Did you ask them for a contract between the Juneau Spruce [422] and the longshoremen?

A. Between the Juneau Lumber and the longshoremen.

Q. Who did you ask about that, please?

A. The various members; Wukich, Joe Guy—all the rest in the Local meeting.

Q. You asked practically every member of Local 16 if they ever had such a contract?

A. Seven or eight of them.

Q. And they said they didn't?

A. They didn't show it to me, wouldn't or something.

Q. Didn't they tell you there was a contract on the Pacific Coast? Didn't they tell you there was a Coast-wise contract for longshoremen?

A. Yes.

Q. And that was the contract that was in effect between the Juneau Lumber and the longshoremen here? A. Yes.

Q. And did you go down to the Northland Transportation Company, a large outfit here, and ask if they knew anything about it?

A. No. I felt if there was no contract directly with the Juneau Lumber Mill it was of no concern.

Q. You mean the Juneau Spruce?

A. The Juneau Lumber Mill.

(Testimony of William H. Flint.)

Q. You took their word for it they had a Coast-wise contract? [423]

A. I took their word for the contract with the Juneau Lumber Mills.

Q. Did you ever go to one of their meetings and ask to see their contract?

A. We are not allowed to their meetings.

Q. To their Hall, or ask for or where you could get a copy? A. I asked the officers.

Q. What official? A. This Mr.——

Q. Mr. Wukich?

A. He was President at that time.

Q. What did he say?

A. He couldn't show me a copy.

Q. What did he say?

A. He said they had a Coast-wise agreement.

Q. And didn't have a copy; is that what he said?

A. I imagine if he had a copy—yes.

Q. Did he say he personally didn't have a copy of it or not?

A. I don't recall if he did or not.

Q. When he told you they had a Coast-wise contract you took his word for it, didn't you?

A. Yes.

Q. You heard about the Coast-wise contract and took his word for it, is that right?

A. Right. [424]

Q. And I assume you talked to other members of Local 16, had a conversation about the same thing; isn't that correct?

(Testimony of William H. Flint.)

A. I don't quite understand your line of questioning.

Q. You talked to other officers of Local 16 the same as you did to Mr. Wukich? A. Yes.

Q. And the answers and questions were about the same as with Mr. Wukich?

A. That is right; that they had a Coast-wise agreement.

Q. And the fact that Local 16 didn't personally have a contract with the Juneau Lumber Mills; you felt that it wasn't a good contract?

A. Yes.

Q. That is where the difficulties arose?

A. Yes.

Q. You are practicing a little law on the side, is that right? A. More or less.

Q. So that was the reason you finally took the position in view of the fact that Local 16 here didn't directly have a contract with the Juneau Lumber. You didn't feel that you fellows had to pay any attention to it?

A. We felt they misrepresented to us when they told us they did have a contract with the Juneau Lumber Mills. [425]

Q. Did you tell them anything about that at any other time—let me withdraw that. It doesn't make much sense. When did your Union, if you put it that way, come to that conclusion?

A. We came to that conclusion on the evening of July 2.

(Testimony of William H. Flint.)

Q. Before coming to that conclusion or immediately after that conclusion, did you discuss it with any members of Local 16? A. No.

Q. Did you ask any members of Local 16 to explain it to you?

A. We already had asked them if they had a contract. They said "No." There was no more explaining to do.

Q. When was that?

A. During this whole dispute we asked for this contract.

Q. They told you they never had a direct contract. They told you they had a Coast-wise contract; isn't that what they told you?

A. First they told us they had a contract with the Juneau Lumber. They didn't mention the Coast-wise contract. Afterwards all they could show us was a Coast-wise contract.

Q. Did they show it to you?

A. They might or might have not, I can't recall for sure.

Q. When did they first tell you they had a contract with the Juneau Lumber Mills? [426]

A. April 1.

Q. How long a period of time elapsed before you went to Mr. Wukich? Was he about the first man you talked to about the contract?

A. He was at the meeting.

Q. Which meeting?

A. We met about every day and about twice a day.

(Testimony of William H. Flint.)

Q. When did the question of a contract come up again?

A. After we got the idea something was wrong.

Q. When was that?

A. I imagine about a week or so after it happened.

Q. After the picket line?

A. After the picket line went up.

Q. You talked to Mr. Wukich?

A. Right. He was head of the Committee.

Q. You don't remember whether he showed you a contract?

A. I don't recall.

Q. He may or may not?

A. That is right.

Q. Didn't they tell you they worked under that contract for the Juneau Lumber Mills for years?

A. After the picket line went up.

Q. On April 1 didn't they tell you they had a contract and had had a contract with the Juneau Lumber Mills and always did the longshore work for them? [427]

A. With the Juneau Lumber.

Q. And April 1 they told you they had a contract?

A. Yes.

Q. And they always told you they had that contract?

A. Yes.

Q. You found that statement to be quite true, didn't you; that they always had a contract and always did the work for the Juneau Lumber Mills under that contract?

(Testimony of William H. Flint.)

A. No; I have never seen a copy yet of that contract with the Juneau Lumber Mills.

Q. Which contract?

A. The one they referred to April 1 which they had with the Juneau Lumber Mills. In the National Labor Relations Board hearing they brought up a Coast-wise agreement. That is the closest to a contract—of a contract with the Juneau Lumber Mills.

Q. Did you see it then?

A. I believe I did.

Mr. Andersen: I am about to start a new subject.

The Court: Go ahead.

Mr. Andersen: Shall we continue?

The Court: We will continue for a while.

Q. I assume that sometime after this business started here, after April 10, that all of the labor people here were quite anxious to get this settled?

A. Absolutely.

Q. You were, of course, and you had several meetings and discussed it with several people. You mentioned discussing it with Mr. Burtz, an officer of your International Union, is that true?

A. That is right.

Q. You say you discussed settling it with Mr. Garst?

A. Yes.

Q. And also Mr. Albright, described as a member, International representative of the International Longshoremen's and Warehousemen's Union; is that true?

A. Right.

(Testimony of William H. Flint.)

Q. When did you first meet Mr. Albright?

A. I believe it was May 8, the same day as I met Mr. Burtz.

Q. May 8 or 15? I have the fifteenth down here.

A. No; May 8.

Q. At that meeting was any suggestion made about arbitrating this difficulty?

A. I am quite sure that was the meeting. I am not positive—that was the meeting where Mr. Burtz—

Q. Suggested it be referred to the C.I.O.?

A. I think so.

Q. And if it was referred to the National C.I.O., that it would be forever and a day and it would be better to have the Local settle it? [429]

A. I am not sure if that is his answer.

Q. Wasn't that his answer?

A. I am not sure.

Q. Weren't you there? A. Yes.

Q. Can't you recall? A. Not every word.

Q. This meeting by yourself, Mr. Albright, Mr. Burtz—by the way, how did you happen to meet Mr. Albright?

A. I met him in the morning of May 8. I was with—I met him at the Baranof Hotel. I think I was with our Regional C.I.O Director up here at that time and was introduced.

Q. Who was that? A. Chris Hennings.

Q. You were introduced to Mr. Albright?

A. I am quite sure by Chris Hennings.

(Testimony of William H. Flint.)

Q. You arranged for the meeting of the eighth?

A. Yes.

Q. Who did? A. I did.

Q. You called Mr. Albright, did you?

A. After our official arrived from Portland that same day, Mr. Burtz, why we both contacted Mr. Albright and had Mr. Albright contact Local 16.

Q. And you wanted Mr. Albright to set in a meeting and discuss [430] a settlement and get his idea and advice on it? A. That is right.

Q. How long did that meeting last?

A. I imagine an hour, off hand.

Q. In this meeting, as I recall your testimony, this is the meeting at which nothing was drawn up?

A. That is right.

Q. Nothing was drawn up?

A. Nothing was drawn up.

Q. Mr. Albright—by the way, was anybody else there with Mr. Albright or was he there alone?

A. He had the Local 16 boys with him.

Q. Who was spokesman for Local 16 there?

A. Mr. Albright seemed to be speaking for both.

Q. Mr. Albright did the speaking?

A. Right.

Q. Did he tell you Local 16 asked him to attend the meeting?

A. No; not that I recall, because I asked him.

Q. Did you ask him to get ahold of Local 16 and attend the meeting? A. Right.

Q. And for the purpose of seeing if Mr. Albright could settle this dispute?

(Testimony of William H. Flint.)

A. I felt——

Q. I mean, is that what you told him? [431]

A. I don't know word for word. It is almost a year ago.

Q. I don't want it word for word, just the bare facts. Did you meet and say something like this: "Mr. Burtz of our International is here in town and Mr. Garst. Suppose you get ahold of Local 16 and come on over and see what we can do about settling this trouble." Is that about it?

A. No. Mr. Albright and I were together when we met Mr. Burtz. Mr. Burtz asked for a meeting. I turned to Vern and asked if he could get Local 16 and try to settle the dispute.

Q. And Mr. Albright sat in the meeting? Did he offer any suggestions about how it could be settled?

A. Yes.

Q. Did he say anything at all? A. Yes.

Q. Did the members of Local 16 talk?

A. Yes.

Q. About some possible basis of settling the dispute, is that correct?

A. Yes.

Q. How long did that meeting last?

A. About an hour.

Q. One hour; and that letter, could I see it please? Exhibit 6. Then you had another meeting about a week later?

A. About a week, I imagine. [432]

Q. Did you see Mr. Albright in the meantime, if you recall?

(Testimony of William H. Flint.)

A. I think I did; I imagine I did.

Q. You don't recall anything, a meeting that occurred at that time, but the next talking was the fifteenth?

A. I was with Mr. Albright practically every day from the eighth day of May until towards the fifteenth.

Q. During this time he was trying to settle the strike—that was all he was talking about?

A. Yes; that is right.

Q. On the fifteenth you had this meeting where this letter of May 14 was discussed; is that correct?

A. That is right.

Q. Do you know if you requested that this letter be written? A. No.

Q. Do you know who requested it be written?

A. Mr. Albright.

Q. Requested that the letter be written up?

A. Yes. Mr. Burtz explained what had happened previously to my coming there.

Q. What was explained?

A. He explained that Mr. Albright asked that Mr. Garst, who was neutral, go to the Company and get a letter of jurisdiction.

Q. Requested that Mr. Garst go to the Company to get a letter of jurisdiction about a possible settlement of the dispute? [433]

A. A letter of jurisdiction as to what the Company felt each Local should have.

Q. And that was this letter, Plaintiff's Exhibit

(Testimony of William H. Flint.)

6, which you discussed there at that time, is that right? A. Right.

Q. How long did this meeting last?

A. That meeting started out about two thirty in the afternoon—at least that is when I arrived—and went on, off and on, until four o'clock the next morning.

Q. When did you leave? A. Four o'clock.

Q. In the morning?

A. Yes; that is right.

Q. That was a long time to try and settle a dispute, wasn't it? A. It certainly was.

Q. Now did you have after that, did you have another meeting? When did Mr. Albright leave that meeting?

A. He left the meeting in the afternoon of May 8.

Q. We are now on the fifteenth. I am talking about the meeting of the fifteenth.

A. I meant the fifteenth; fourteenth or fifteenth. He left the meeting the first time about oh, I would say about half past four.

Q. Morning or afternoon? A. Afternoon.

Q. When did that meeting start, the meeting of May 15?

A. That is the one that started in the afternoon.

Q. About four o'clock, and when did Mr. Albright leave the meeting?

A. It started at half past one or two and about two thirty I came in and he left about four or half past.

(Testimony of William H. Flint.)

Q. Did he come back any more?

A. We moved the meeting from our hotel to his hotel, to the Gastineau.

Q. When did you move the meeting?

A. We all got together about seven o'clock in the evening.

Q. Is that when the letter was discussed, Exhibit 6, or had it been discussed before?

A. Before and at that time also.

Q. And then you continued to discuss ways of settling the strike or lock out, is that right?

A. Yes.

Q. Nothing was accomplished that night, was it?

A. No.

Q. I assume the members of Local 16 there were anxious to work out some basis of settling it?

A. I wouldn't say "anxious."

Q. They talked about ways and means of settling the difficulty?

A. They talked one way.

Q. Did they make any suggestions?

A. Only one. They all made the same one.

Q. Did you make any suggestions to them?

A. I don't recall if that is the meeting where I made a suggestion about a Union Shop election or not. It may have been.

Q. At the meeting did you make any suggestions to the longshoremen about how the strike could be disposed of?

A. I don't know. I don't recall.

Q. Now, at the meeting of May 8, did Mr. Al-

(Testimony of William H. Flint.)

bright at that meeting suggest that the matter of arbitration be taken up and have some local person arbitrate the matter?

A. I don't recall. He may have.

Q. On May 8. Did he make the same suggestion on May 15?

A. He might have. I don't know.

Q. Mr. Albright made that suggestion quite a few times?

A. I don't recall him ever making it; no.

Q. You say he may have; don't you have any——

A. That was a year ago. There have been so many suggestions. He may have, but at the same time I can't swear to it.

Q. Somebody suggested arbitration, but you don't know who?

A. If I say "No," then I know. There were so many ways and suggestions; I can't swear to all of them. Some of them I can.

Q. I am only talking about one statement, one suggestion. I [436] asked you if Mr. Albright at the meeting of May 8 made a suggestion that the matter be submitted to arbitration. Didn't he say "Let's get the Company and everybody involved and sit down before some impartial person in Juneau and get it settled in a hurry"?

A. I don't recall.

Q. May 15 didn't he suggest that the matter be submitted to arbitration? A. I don't recall.

Q. Did you attend the Mayor's fact finding committee? A. No.

(Testimony of William H. Flint.)

Q. Did you ever recall hearing Mr. Albright say anything about arbitration?

A. No, I don't think I did.

Q. Who suggested, as you testified a little while ago, that the matter be referred to the National CIO for arbitration there?

A. That was made by our representative, Virgil Burtz.

Q. To whom did he say that?

A. Mr. Albright.

Q. And did Albright say anything about that?

A. He said "No."

Q. What else did he say besides "No"?

A. I just can't recall. I know the end result was "No."

Q. Didn't he say, referring to the National CIO, "It will [437] have to wait the outcome of an Executive Board meeting of the National CIO, which will take forever and a day. This is a Local dispute; let's get it settled by local arbitration." Didn't he say that or words to that effect?

A. I can't swear to that.

Q. Did he say that or a lot of different words?

A. A lot of different words.

Q. You wouldn't say he didn't say that?

A. No, I couldn't say either way.

(Whereupon the jury was duly admonished and Court adjourned until ten o'clock a.m. May 4, 1949, reconvening as per adjournment with all parties present as heretofore and the jury

(Testimony of William H. Flint.)

all present in the box; whereupon the trial proceeded as follows:

The Court: You may proceed.

Mr. Strayer: May I inquire if counsel has the records that we requested?

Mr. Andersen: So far we have been unable to find any.

Mr. Strayer: Do you have the name of the Local Secretary?

Mr. Andersen: There is no Secretary of the Local at this time.

Mr. Strayer: Who has charge of the records?

Mr. Andersen: I think Mr. Pearson, but I will check [438] and let you know.

(Whereupon the witness William H. Flint resumed the witness stand and the Cross-examination by Mr. Andersen continued as follows:)

Mr. Andersen: Will you read the last question, Miss Reporter?

Court Reporter: "To whom did he say that?"

A. "To Albright." Q. "And did Albright say any-

thing about that?" A. "He said 'No'." Q. "What

else did he say besides 'No'?" A. "I just can't re-

call. I know the end result was 'No'." Q. "Didn't

he say, referring to the National CIO, 'It will have

to wait the outcome of an Executive Board meeting

of the National CIO, which will take forever and a

day This is a Local dispute; let's get it settled by

local arbitration.' Didn't he say that or words to

that effect?" A. "I can't swear to that." Q. "Did

(Testimony of William H. Flint.)

he say that or a lot of different words?" A. "A lot of different words." Q. "You wouldn't say he didn't say that?" A. "No, I *could* say either way."

Q. Over the night, has your memory been refreshed as to what Mr. Albright said at that meeting? A. No, it hasn't.

Q. During all that conversation, which was May 8 or 15, the date is immaterial for the purpose of the question, do you recall any conversations with Mr. Albright in which [439] Mr. Albright referred to the possibility of arbitration?

A. I don't think so.

Q. Do you recall any conversation at all with Mr. Albright, whether the conversation was with you or you were simply present, and where Mr. Albright made a general statement so far as Local 16 was concerned, that it would consent to arbitration, negotiation, mediation or conciliation by the Government or a resident of Juneau agreeable to the parties?

A. That question—you have a double question there. To the first part, of outside conciliation, I believe the answer was always "No," but so far as local conciliation, I believe they would have agreed to that.

Q. I am asking you during any conversation where you were present, whether you participated in the conversation or not, did any representatives of Local 16, including Mr. Albright, make any statement that they would at any time consent to arbitration of this dispute?

(Testimony of William H. Flint.)

A. As far as I can recall——

Q. They did? I am asking if they said that.

A. I would say "No."

Q. Are you stating your opinion, that they would have agreed to local arbitration?

A. By a local conciliator; yes.

Q. Did they say that? [440]

A. That I am not positive of.

Q. On what do you base that conclusion when you say they would have agreed to arbitration or conciliation?

A. Because all during this dispute we would get together and talk, perhaps in a restaurant, or passed or met one or the other and it always seemed to be the idea behind the conversation that they could have conciliation with the Company. For instance, we would see a Labor Department man here in Juneau or someone else locally, but I don't think it came up, the fact of consenting to an arbitration committee of outside interests.

Q. You understand from everything that was said during all the time of this strike, whether Mr. Albright was here or not, so far as Local 16 was concerned, at all times they were understood by you as being willing to have the matter arbitrated?

A. I would say "No" to that.

Q. I beg your pardon?

A. My answer to that is "No."

Q. Part of the time were they agreeable to arbitration?

(Testimony of William H. Flint.)

A. I would say "No" to that question.

Q. Why do you say "No" to that?

A. They would go for local conciliation but not outside.

Q. I am talking about local.

A. Then I would say "Yes." [441]

Q. Do you—whether or not it was local conciliation—by conciliation do you mean arbitration?

A. I usually have found that the words "arbitration" and "conciliation" are used in almost the same sense of the word.

Q. "Conciliation," for the purpose of this conversation, will mean "arbitration"; is that satisfactory to you? A. Yes.

Q. You discussed arbitration — conciliation— with Local 16 on several occasions?

A. Yes, sir.

Q. You discussed arbitration with a local Labor Department man? A. Yes.

Q. Who was that? Do you know his name?

A. Whoever was in the Labor office.

Q. A Territorial official?

A. Territorial Commissioner of Labor; Henry Benson or his assistant.

Q. Did you discuss arbitration with the Company? A. Yes.

Q. In the presence of representatives of Local 16? A. No.

Q. Did you ever discuss arbitration with the Company in the presence of Mr. Albright? [442]

(Testimony of William H. Flint.)

A. Yes, I did. I will take that back. The other question—I did discuss it a little with Mr. Albright and one of the Local boys.

Q. When was that?

A. I would say about November 15, perhaps.

Q. Of 1948? A. 1948.

Q. Then you have discussed the possibility of arbitration with the Company, have you?

A. Yes.

Q. And you have discussed arbitration with representatives of Local 16? A. Yes.

Q. But you never discussed arbitration with representatives of the Company when representatives of Local 16 were present; that is my understanding?

A. Only that once I just mentioned, last year, of November 15, or whatever it was.

Q. Were representatives of the Company present then? A. Yes.

Q. And that was when?

A. November 15; somewhere in there—the middle of November sometime.

Q. Prior to that date you had not discussed the matter of arbitration with both parties together, that is, the [443] Company and Local 16?

A. I don't believe I did.

Q. And during all that time Local 16 was willing to arbitrate?

A. With a local conciliator; that is right.

Q. And the Company refused to arbitrate?

(Testimony of William H. Flint.)

A. Yes.

Q. And November 18, or whenever it was—November 15 or 18 of last year—Local 16 was still willing to arbitrate, was it? A. Yes.

Q. And no arbitration meeting has ever been held, has it?

A. Only between us and Local 16.

Q. You people had agreed among yourselves they could do the work, so it was not a matter to be arbitrated, but so far as Local 16 and the Juneau Spruce Corporation, they never sat down to arbitrate because the Company wouldn't sit down to arbitrate; that is true? A. Only once they did.

Q. Did they ever sit down to arbitrate?

A. I don't know what words—they sat down in one group and talked it over.

Q. That is negotiation—did they ever agree to arbitrate? A. Who?

Q. Juneau Spruce and the ILWU, although you were not a [444] necessary party.

A. All three parties to arbitrate, you mean?

Q. Yes.

A. As far as I know, all three parties never agreed at the same time anyway.

Q. Do you know of any time that the Juneau Spruce Mills agreed to arbitrate this whole issue?

A. I don't think they ever did; no.

Q. Never did? A. No.

Q. They refused on November 15 of last year to arbitrate, didn't they?

A. I couldn't answer "Yes" or "No" to that

(Testimony of William H. Flint.)

directly, because it was a roundabout method there and——

Q. In any event——

Mr. Banfield: I object to having counsel cut off the answers in the middle and ask for an answer. He said he couldn't answer "Yes" or "No" and wanted to state why. He has the right to do that.

Mr. Andersen: Will you read the answer, Miss Reporter, so he could complete it?

Court Reporter: "I couldn't answer 'Yes' or 'No' to that directly, because it was a roundabout method there and——"

A. That was a case of where their Local 16, our Local and the Company met and the Company did agree that if Local 16 [445] and our Local came to some agreement over jurisdiction at that time that then they would look the agreement over and see if they would agree to it.

Q. I am talking about arbitration, Mr. Flint. You understand what arbitration is, don't you?

A. Well——

Q. That is where two parties to a dispute agree upon a person, like a judge, to settle it. The Juneau Spruce on April 18 didn't agree? A. No.

Q. Your Union and Local 16 were willing to arbitrate at the time, weren't you? A. No.

Q. When did you change your mind? You stated a moment ago——

A. I don't believe I said on that time where we were willing to arbitrate——

(Testimony of William H. Flint.)

Q. Did you change your mind about arbitration?

A. Our whole Local changed our minds after they went back to work.

Q. You weren't willing to arbitrate it after that?

A. No.

Q. You were never willing to arbitrate this dispute? A. Yes.

Q. And you are not now?

A. I can speak for myself and not speak for the Local. [446]

Q. So far as you personally are concerned—

A. From what I personally and from my Local—their opinion is that they are not, either, according to their last vote.

Q. Just to button this up, the Juneau Spruce Corporation never at any time agreed to arbitrate this matter? A. As far as I know they didn't.

Q. And as far as you know Local 16, from the time the dispute started until this moment, had always expressed willingness to arbitrate?

A. I can't answer "Yes" or "No" on that either.

Q. At anytime did they ever refuse to arbitrate this, as far as you know?

A. Like I say, they did consent to any local conciliation, but not to any outside conciliation.

Q. Did they ever refuse to have an Alaskan arbitrator arbitrate this dispute? A. No.

Q. With respect to this barge, you said the barge was loaded sometime or other, this barge you saw at Tacoma?

(Testimony of William H. Flint.)

A. I would say the barge was loaded—it was in the month of August sometime.

Q. August of 19——? A. 48.

Q. 48. And what business took you to Tacoma?

A. At that time I went to the International convention in Portland for IWA men.

Q. And you went over to Tacoma, did you?

A. Also; yes.

Q. And you say you saw a barge there?

A. The barge was there; that is right.

Q. And there was lumber on the barge?

A. Lumber on the barge.

Q. How long did you stay there, by the way?

A. On the way to Portland I stopped in Tacoma for one afternoon and on the way back I stopped in for, probably I was there eight hours, I imagine—six or eight hours.

Q. Over how long a period, a day? Did you see it on the same day or successive days or when?

A. When I went down, or the second time I was in Tacoma, I saw it.

Q. In other words you saw it on one occasion, is that correct? A. Yes.

Q. Just one occasion? And that was when?

A. That would be about October the 16th or 17th; I am quite sure.

Q. Did that barge have the name of Juneau Spruce on it, if you know, or was it—— [448]

A. I believe that was—it had the name of the company who they get their barges from sometimes. I can't recall what company it is.

(Testimony of William H. Flint.)

Q. Are you trying to tell us you recognized the barge?

A. As the one that left here; that is right.

Q. During the time from May 8, when I understand you first met Mr. Albright, how many discussions did you have with him?

A. Like I said yesterday, we had quite a number of regular meetings, planned meetings which we called, and I would meet him on the street several times a day.

Q. The street things would be a sort of curbstone conversation of a momentary nature?

A. That is right.

Q. The others are the ones you would schedule with Local 16?

A. That is right.

Q. And sometimes Mr. Albright would be there and sometimes he would not be there?

A. As a rule he was there. Sometimes he wasn't.

Q. When was the last meeting, do you recall?

A. With Mr. Albright?

Q. The last meeting Mr. Albright attended, so far as you can recall.

A. On November, about the end of November I think.

Q. Of 1948? [449]

A. 1948.

Q. Now, Mr. Albright—you said he left around the end of May, didn't he?

A. As I recall he did leave for a short while.

Q. He left around the middle of May and didn't come back until around the first part of July, isn't that correct?

(Testimony of William H. Flint.)

A. I don't know when he came back.

Q. Do you recall seeing him during the month of June at all?

A. I don't think I did. I couldn't swear I did.

Q. Do you recall seeing him during the month of July? A. Yes.

Q. Do you recall seeing him more than once? There was a celebration here at that time, the Fourth of July?

A. The Fourth of July; that is right.

Q. Do you recall seeing him during the period of that celebration?

A. No, I didn't during the celebration.

Q. Do you have any definite recollection of seeing him more than once during the month of July last year?

A. I recall seeing him after one of our regular Local dates when we meet. I saw him after that meeting. That must have been about the middle of July.

Q. One of your meetings? An IWA meeting itself? A. Right.

Q. Or an IWA meeting with the ILWU 16?

A. IWA.

Q. That was in July? A. Yes.

Q. You just saw him?

A. I talked to him.

Q. With some member of Local 16 also?

A. He was sitting with a couple of members, if I recall correctly.

Q. Where?

(Testimony of William H. Flint.)

A. At the CIO Hall lobby.

Q. You sat down and talked with him?

A. No, I walked up and talked to him for a few minutes.

Q. Do you recall what the discussion was about then? A. Yes.

Q. What did you talk about then?

A. There had been an article in the Empire, our local newspaper here, and in this article it stated some things I had said about Albright which I had not said, and Albright went on the radio and said they were wrong.

Q. You wanted it corrected?

A. I went over to Albright and said that they were wrong and had put a correction in myself.

Q. That was in July? I guess that isn't an important aspect. A. Not that I know of.

Q. That was the last time you saw him in July?

A. I can't recall. I don't know if I saw him again. I might have.

Q. You have no recollection of seeing him and discussing with him this dispute in July, except that one discussion? A. That is right.

Q. Do you recall seeing him in the month of August, 1948? A. Not that I recall of.

Q. Do you recall seeing him in the month of September?

Mr. Banfield: If the Court please, I object to this line of questioning. I can't see any importance as to what months they were. He testified he met with him any number of times, but a question as

(Testimony of William H. Flint.)

to every month in the year, just when Mr. Albright was here and when he wasn't here—I can't see that it has any materiality.

The Court: He has a right to find out what this man's dealings were, so to speak with Mr. Albright, but it seems to me instead of asking the witness as to specific months, wouldn't it be just as well to ask as to the intervening period, July-November?

Mr. Andersen: Maybe I have a different idea in mind. I don't want to be presumptuous.

The Court: Objection overruled.

Q. Did you see him in the month of August?

A. No, so far as I recall.

Q. Did you see him in the month of September?

A. As far as I know I didn't.

Q. You saw him how many times in November?

A. Let's see—I would say about four times.

Q. And after November until this trial began, did you see him at all?

A. Not that I can recall.

Q. As I understand it then, on your direct examination, as I understood it—I may have been in error—you talked with him, met with him, about one hundred times. Of course that isn't correct?

A. I was using that phrase to mean all the times we met, on the street, and all the times we met—it might have been one hundred times, maybe not.

Q. You only had a few conversations with Mr. Albright regarding this situation at the Juneau Spruce, isn't that true?

(Testimony of William H. Flint.)

A. Every time I met Mr. Albright we talked about this, I am quite sure.

Q. Of the one hundred conversations you had with him you can remember about four where you really discussed this problem?

A. Where I can come down and get an actual date or——

Q. Or the substance.

A. I know I talked to him.

Q. That is about four conversations which you can recall and having some bearing on the subject discussed here, and [453] each of these situations were—strike that. On each of these four occasions that you mentioned, he was with representatives of Local 16, I assume?

A. You mean in the month of November?

Q. Pardon me, the four times you met with him where this general situation was discussed, was he with representatives of Local 16?

Mr. Strayer: Your Honor, the witness testified there were more than four times in November alone.

Mr. Banfield: Counsel is specifying four times out of the one hundred he is talking about.

The Court: I assume he embodied in the questions what had already been testified to by the witness, but if the form of the question is unwarranted I guess the witness can call his attention to it.

A. I would like to, your Honor.

The Court: Go ahead.

A. I testified I met Mr. Albright during the month of November four times.

(Testimony of William H. Flint.)

Q. You mean you testified a few moments ago that you talked with him once about the eighteenth of November and maybe another four times you talked with him about the discussion here?

A. You asked me how many more times in November.

Q. Tell me how many times you met with him in November and [454] discussed this dispute with him?

A. I met him the first time in the Company's office.

The Court: All he asked was the number of times. Just answer that.

A. Five times.

Q. All right. In November, where did you meet the first time and give me the date if you can, or the approximate date?

A. In the Company's office about the middle of November.

Q. Who was present at that time?

A. Mr. Albright and one of the Local boys of his Local and our manager, Mr. Schultz and myself and one of our Local Shop Stewards.

Q. Is that the time—strike that. And when is the next time you met him in November?

A. The next time was, I am quite sure, Thanksgiving Day in the Longshoremen's Hall.

Q. Thanksgiving? A few moments ago you testified it was November 15 or 18; is that correct or incorrect?

(Testimony of William H. Flint.)

A. That was in the Company's office.

Q. What was the date of your first meeting?

A. About the 15th or 18th or around the middle of November.

Q. The next meeting was Thanksgiving—dinner or something?

A. No; it was a meeting in the Longshoremen's Hall.

Q. Did you discuss this dispute with him at that time? [455]

A. Yes.

Q. When was the next time?

A. In his hotel room in Juneau, in the Gastineau Hotel. I am not quite sure but I think it was a matter of a day or so later.

Q. Do you recall what was discussed then?

A. We talked about this dispute.

Q. When was the next time you met him?

A. The next time I met him all alone in the Gastineau Hotel with one of my Local Shop Stewards.

Q. Do you recall what was discussed then?

A. The same thing, this dispute.

Q. And the next time?

A. A couple days after that. They were a few days apart, each meeting.

Q. Do you know when you met him again?

A. That was our last meeting, I think. I am quite sure it was.

Q. The last question which brought up this was, I said during the entire period of time, I said you

(Testimony of William H. Flint.)

mentioned you had about one hundred meetings and you said that included street meetings and everything. I understood you to say that there were one hundred times you saw him and a few minutes later you said there were about four, where you actually sat down and discussed this. Did you understand that? [456]

A. No, I did not.

Q. These times you mentioned—how many meetings were there where you sat down and really discussed this problem?

A. You mean from the start of the dispute until the present time?

Q. It couldn't be before May 8.

A. That is right. We actually sat down and discussed this at a called meeting perhaps fifteen or twenty-five times.

Q. And during all these meetings Mr. Albright, the theme of what he was saying was, so far as Local 16 was concerned, they wanted arbitration, conciliation or negotiation in some manner to try and end it on that basis?

A. I can't answer it "Yes" or "No."

Q. Answer it one way and then explain it.

A. I can say "Yes" and then I can say that from start to finish of this dispute that their basis——

Q. I am just talking about from May 8.

Mr. Banfield: Let him answer.

The Court: I think he should be allowed to finish.

A. Yes; and then as I say, from start to finish

(Testimony of William H. Flint.)

Albright and Local 16 were willing to have this arbitration, or sit down and negotiate it on one basis only—that they get the work of loading lumber on barges at the Juneau Spruce, and no other method would work, arbitration or anything else. They would sit with anybody at any time and tell [457] them they wanted to load the barges at the Juneau Spruce.

Q. Have you completed your answer?

A. I have.

Q. Did I understand you to say—I will put it another way. The dispute at the Juneau Spruce was just on—on April 9, of 1948, the dispute was who was going to load the barges. Wasn't that the dispute?

A. Who was going to load barges?

Q. That was the only issued involved, wasn't it?

A. As far as I know it was; yes.

Q. When Local 16 talked about arbitrating, didn't you understand that by arbitrating this business, the only question for arbitration would be to decide which men would load the barges?

A. On arbitration, I would say "No."

Q. What is your idea of arbitration, Mr. Flint?

A. I would say arbitration—if I asked for something and another fellow asked for something, and we sat down and talked it over, we would both have to give a certain amount. That is my idea of arbitration.

Q. That is negotiation. I don't like to talk to a person unless we understand the same terms. Let me explain.

(Testimony of William H. Flint.)

Mr. Andersen: I am sorry, may it please the Court.

Q. If you were the longshoremen and I were the I.W.A. and you and I both agreed that the longshoremen would load the [458] barges, then there would no longer be an argument about it, so far as we are concerned. A. True.

Q. There would be nothing to negotiate, nothing to arbitrate; isn't that so? A. Right.

Q. Because we are in agreement. If the Judge up there, make him the Spruce Company for a moment, if you and I agreed who would load the barges and the Judge, the Spruce Company who really has no interest in it, refused to let the longshoremen load the barges and agreed to arbitrate, the question would be—wouldn't it be who would load the barges? A. That would be the question; yes.

Q. So, when you were talking about arbitration a short time ago, didn't you understand the question would be who would load the barges; isn't that what you understood?

A. No; I understood who—or where both parties helped in loading the barges, they would have to come to an agreement.

Q. Didn't you understand that whatever the arbitrator said would be binding on both parties?

A. I didn't know that the arbitrator's ruling was the last word in any dispute until all of the ones in the whole dispute had agreed to it, in the end, after he had made [459] a ruling, and then if they all agreed to it, it would be what would go.

(Testimony of William H. Flint.)

Q. Local 16 said "Let's appoint an arbitrator, put all the facts before him. Whatever the arbitrator says will be binding on us." Didn't they say that? A. Words to that effect; yes.

Q. So the question of who would load the barges would be referred to an arbitrator, where the Juneau Spruce Company and the longshoremen—and not you people, because you already agreed that the longshoremen could do it—would state facts to the arbitrator and the arbitrator would say they would load them, or either that the longshoremen would not load them. You understand that clearly, don't you?

A. Part I don't understand. I never heard Local 16 say that if the arbitrator said they would not load them, that they would consent to that.

Q. Did you ever ask them the question, or did you talk to them, not knowing what arbitration meant, or conciliation meant, or mediation meant—do you understand those terms?

A. I thought I knew them before I got up here.

Q. I think you did, too, when I talked to you before about the longshoremen agreeing to arbitration and the Company refused. You knew what the Company was refusing to arbitrate, the question of whether the longshoremen would load [460] the barges or not; isn't that true? A. Yes.

Q. Of course it is. It is the Company who refused to arbitrate, not the longshoremen; isn't that right?

(Testimony of William H. Flint.)

A. I couldn't answer that "Yes" or "No" either.

Q. Answer it one way and then explain it.

A. I would say "Yes," that they would not arbitrate it.

Q. Who, the Company?

A. The Company, but at the same time the Company knew that Local 16 would consent to only one end result and that is that they would load the barges.

Q. You are getting me confused now. Are you trying to tell us that the longshoremen—putting it another way, are you trying to tell me now that the Spruce Company refused to arbitrate the question of who would load the barges, but at the same time that the longshoremen said "We will consent to arbitration provided we win." Is that what you are trying to tell me?

A. That is about the size of it. I would like to explain some, your Honor.

The Court: You can explain.

A. I would like to know—ask anyone in this courtroom—how you can have any kind of arbitration——

Q. You are not allowed to ask questions. You can explain your answer, but not interrogate the audience. [461]

A. The way arbitration has been used in this dispute from start to finish; there can be no arbitration when all parties concerned want one end result, when the longshoremen want to load the barges and

(Testimony of William H. Flint.)

the Company wants the I.W.A. to load the barges, there can't be any arbitration on either side.

Q. There can't be? A. No, there can't be.

Q. Why do you say that?

A. I don't see how it can be.

Q. You had no argument on April 10?

A. April 10; no.

Q. You said you would let the longshoremen load the barges? A. Yes.

Q. And the Company said they wouldn't?

A. Yes.

Q. The longshoremen said they wanted to, and they said the I.W.A. is agreeable to us loading the barges; that is correct, isn't it?

A. Yes, that is right.

Q. The only question would be who would load the barges? A. Yes.

Q. We will take all your answers together and I think we can skip this subject. Then in one of these meetings you referred to, to button this aspect of the case up,—strike [462] that. During any of these meetings where arbitration was discussed, was Mr. Benson, the Territorial Commissioner of Labor, present? A. Yes.

Q. And were you present?

A. I was present with Mr. Benson and the Company.

Q. Yes. When arbitration was discussed?

A. Yes.

Q. Now, in all of these meetings that we have

(Testimony of William H. Flint.)

talked about here, as I understand it, and to end this aspect of it, the purpose of these meetings was to try to work out some solution to resolve the dispute. Is that true? A. That is right.

Q. That is particularly true of the meetings attended by Mr. Albright with members of Local 16; is that right? A. Right.

Q. And true of these other meetings with Mr. Albright, as he expressed himself, "to find some amicable way of ending the trouble then existing." Is that true?

A. Yes, as long as the Local 16 could load the barges.

Q. Did Mr. Albright—did I understand you to say that Mr. Albright never consented to arbitration and said "We will consent to arbitrate this dispute if we win it?"

A. That is about what I would sum it up as; yes.

Q. You are saying that Mr. Albright never [464] consented to arbitrate; isn't that true?

A. I will have to say I got the words "arbitration" and "negotiation" mixed up.

Q. Do we have to start this all over again? When you talked about negotiations to get the work done, when you talked about arbitration you meant——

A. Local 16 was always willing to set down and thrash this thing out.

Q. With the mill?

A. The mill and us, with the thought that they would load the barges.

(Testimony of William H. Flint.)

Q. Certainly. We'd better explain the terms again. Everything you said as to arbitration should have been referred to as negotiations. Is that true?

A. Perhaps you are right.

Q. That means, therefore, so far as negotiations with the Company is concerned—particularly at this early stage when probably there was more talking than later—that Local 16 representatives always said they would negotiate with the Company “with the consent of the I.W.A. we can do this work. The Company has no reasonable basis for not giving us the work and so we want the work.” Is that true?

A. Yes.

Q. Substantially so. They changed their position and said [464] they would arbitrate the issue and whatever the arbitrator says about this work, we will be governed thereby?

A. I believe you are right, that they consented to a local arbitrator.

Q. And whatever he said regarding loading barges they would be bound by?

A. If that is what arbitration is. If they used the word “arbitration” and consented to arbitrate, I imagine that is what they meant.

Mr. Strayer: I move the last answer be stricken.

Mr. Andersen: It is cross-examination.

The Court: Did you say the last answer be stricken?

Mr. Strayer: Yes, your Honor. He testified to what he imagined the longshoremen meant.

(Testimony of William H. Flint.)

The Court: Of course, the world "imagine" wouldn't make the answer subject to being stricken. That is so often used in a sense of believing or thinking. In view of the fact that counsel has had difficulty finding out just what the witness meant by these several terms and some of his answers, I think the motion will have to be denied.

Mr. Andersen: Would you read the last question and the last answer?

Court Reporter: Q. "And whatever he said regarding loading barges they would be bound by?"

A. "If that is what arbitration is. If they used the word 'arbitration' and consented [465] to arbitration, I imagine that is what they meant."

Q. Is that correct, sir—your last answer?

A. That is correct.

Q. In these fifteen or twenty meetings you talked about the difficulty the Union was having?

A. That is right.

Q. And you wanted the Union to remove the picket line? A. Right.

Q. You fellows wanted to return to work if you could, honorably? A. Right.

Q. Was it during this discussion of the picket line that this question of arbitration came up as the basis of settling this dispute, because you fellows wanted it settled?

A. I believe that is when it came up, during those discussions.

Q. When you discussed it with representatives

(Testimony of William H. Flint.)

of Local 16 you discussed the whole situation, that you wanted to return to work if possible, wanted the longshoremen to do the loading, and wanted to figure any way of settling so the picket line can be removed; is that correct?

A. I can't answer it all "Yes" or all "No."

Q. I will split it up. Probably all the discussions about the picket line resolved themselves into how the whole matter can be adjusted; that is correct?

A. Correct. [466]

Q. And these discussions were usually held with representatives of Local 16 and sometimes Mr. Albright was present; is that what you say?

A. That is right.

Q. And sometimes Mr. Albright might speak for the Local and at other times other members might speak for the Local. Is that true?

A. That is right.

Q. I assume during this period of time that as you indicated before, that you occasionally talked to Mr. Albright to get advice from him as an old head about trade unionism and such as that? Is that correct?

A. I don't know that I ever asked him for any advice or not. I may have.

Q. You have no recollection?

A. No recollection of a specific instance.

Q. During the time that Mr. Albright was here you got along all right with him, did you?

A. Yes; always have.

(Testimony of William H. Flint.)

Mr. Andersen: Just a moment, your Honor. That is all. Thank you. [467]

Redirect Examination

By Mr. Banfield:

Q. Mr. Flint, you testified here yesterday regarding your job and what the Company was doing down at the plant during the winter of 1947-1948, a year ago this last winter. What did they do down at the plant? A. You spoke of 1947-1948?

Q. Yes.

A. Yesterday I spoke of 1948 and 1949.

Q. In other words, you didn't pretend to know what was done at the plant while it was shut down the winter of 1947 and 1948?

Mr. Andersen: I object. The question is leading.

Mr. Banfield: I think, if the Court please—I would like to clear up the date he was talking about.

The Court: The objection is to the form of the question, which is leading.

Q. When were you first employed there?

A. In April, 1947.

Q. In April, 1947. Now, at the end of that year do you know what kind of work the Company was doing? A. Yes.

Q. What kind of work were they doing?

A. They remodelled the sawmill at certain places, at places the mill was rotten and they had to put some new stuff in and new material, and motors

(Testimony of William H. Flint.)

burned out—they put in new [468] motors and machinery of all types.

Q. What kind of work were you doing that winter, outside or inside? A. Inside.

Q. This was before the strike? A. Yes.

Q. Was it a continuous repair and rebuilding during the whole winter?

A. Yes, I would say it was.

Q. Now, during the next winter, what kind of work did they do?

A. I would say it amounted to about the same thing.

Q. Was it a case of tearing out from the winter before or was it different?

Mr. Andersen: What winter are you talking about now?

Q. The winter of 1948.

A. It was a case of tearing out a certain amount that had been put in and a case of putting in in places in the mill that got rotten from years ago, which had already been there. It was practically the same type of work as the winter before.

Q. Now Mr. Flint Mr. Andersen asked you a question and I asked the Reporter here to read the question specifically, to which you answered "Yes" yesterday. I will try to [469] frame this question as he did. He said, "Didn't you agree on July 3 in a written agreement marked as Plaintiff's Exhibit No. 7 that you would claim jurisdiction of all work performed by employees of the Juneau Spruce Cor-

(Testimony of William H. Flint.)

poration according to your contract, and also the loading of the Company-owned or leased barges with Company-owned gear?" Was that the statement? Do you remember that question?

A. Yes, I do.

Q. You did answer "Yes" to that question, did you not? A. I believe I did.

Q. Mr. Flint at this meeting of April 9 just before the picket line was established, you said that you presumed that they read the minutes, but you didn't hear them. Is that your testimony?

A. I presume that they were read; yes.

Q. Is it the custom to read Union's minutes at a public meeting? A. No, it is not.

Q. In view of the fact that it was a public meeting, would you make the same presumption?

Mr. Andersen: I object to that as something not in evidence, and second as leading and suggestive. Counsel is testifying rather than asking questions.

The Court: I think he has already testified as to the character of the meeting. [470]

Mr. Andersen: He said they were all eligible to join. Everybody who was there was eligible to join, the witness said.

The Court: He may be interrogated as to the character of the meeting and whether or not he knows minutes of it were made.

Q. You may answer.

A. I forgot the question.

Q. Would you presume the Union would, at a public meeting, have the minutes read?

(Testimony of William H. Flint.)

Mr. Andersen: I will object to the form of the question as calling for a conclusion of the witness.

The Court: Objection overruled.

A. I presume that if we had an officer who had taken the minutes who knew what he was doing, the minutes would not have been read. Due to the fact that we had officers who made records as he did and kept such a record as he did, I presume he would read them.

Q. You testified that the Juneau Spruce Corporation paid your expenses to Portland. How much did they pay you?

A. A couple hundred dollars.

Q. Do you know the exact amount?

A. I am almost sure that is what it was. It was \$200, I am quite positive.

Q. Was this money paid to you before you [471] left or after you came back? A. Before I left.

Q. Will you tell us how it was that the Juneau Spruce Corporation gave you this \$200 to go to Portland?

A. I received a phone call from one of the Company officers in Oregon, Mr. Card, and he asked me—he had heard rumors——

Mr. Andersen: I am going to object to that as hearsay.

The Court: Yes.

Q. Just state what he stated.

The Court: That is subject to objection. I think

(Testimony of William H. Flint.)

the conversation between them can be eliminated, can it not?

Mr. Banfield: I think probably it can, if the witness so phrases it to state what transpired.

The Court: He can answer why he went down.

Mr. Banfield: Yes.

Q. Why did you go down to Portland?

A. To see the International Officers of our Union and the lawyer of our International so that I could find out the operation of the Taft-Hartley labor law, which I couldn't find anyone in Juneau who did know how it operated.

Q. Now, Mr. Flint, were you asked to go down there by anyone?

A. I was asked to go down; that is right.

Q. By whom?

A. By the man who represented the Company.

Q. Who?

Mr. Andersen: He said by the man who represented the company.

A. Mr. Card.

The Court: You can be specific.

A. Mr. Card.

Q. Did anybody else ask you to go?

A. No one else asked me, no.

Q. Did you have any meeting with your Union officers about going?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial.

Mr. Banfield: If the Court please, I would like to show his authority for what he was doing.

(Testimony of William H. Flint.)

The Court: That he went down, you mean, as representative of the Union?

Q. Did you go as a representative of the Union?

A. I did.

Q. Did you have authority to go?

Mr. Andersen: I object to that as calling for a conclusion and opinion of the witness. I never heard of a Union sending anybody at his own expense.

Mr. Banfield: You will learn about it in due time.

Mr. Andersen: We always learn. [473]

A. I called officers of my Local and representatives of Local 16, the Longshoremen's Union, and told them I was going to Portland at the Company's expense and they raised no objection to my going.

Mr. Andersen: I move that the last answer be stricken as a conclusion and opinion of the witness.

The Court: Objection overruled.

Q. Now, Mr. Flint, you stated that the Company paid you \$200 at this time. Was there any further understanding about this \$200 between yourself and the Company? A. Yes, there was.

Q. State what it was.

A. I told him that we had a very small amount of money in our Treasury at the time and I couldn't take the money, and if they wanted our Local to know what was right and what was wrong and have them contact someone who knew, they would have to pay the expenses down there, and they might get

(Testimony of William H. Flint.)

it back and they might not, depending on how successful our Union was in the next few years.

Q. Did you have \$200 in the Treasury at that time? A. I don't think we did.

Q. How much did you spend on that trip?

A. I spent over that, I know.

Q. Who paid the balance? A. I did.

Q. Has the Union ever had \$200 since then?

A. No.

Q. Where did the money come from for you to go down on the second trip?

A. The men in our Local came to the Hall and the Convention Ordinance was read to them that we should send a man to represent our Local to this convention, and they dug in their own pockets, by vote, of course, and chipped in the money for me to go to Portland.

Q. As the result of this trip to Portland is the Union indebted to the Juneau Spruce Corporation—

Mr. Andersen: I object to that as calling for the conclusion and opinion of the witness.

Q. For this amount of \$200?

The Court: Objection overruled.

A. As far as I am concerned we are not.

Q. Are not?

A. Unless at such a time in the future we had enough to see our way to pay it back without hurting our finances in the Local.

Q. In other words, there was no definite promise that you would pay it back?

(Testimony of William H. Flint.)

Mr. Andersen: I move that be stricken. It is the testimony of counsel.

The Court: He just repeated in effect what had already been testified to. The motion is denied.

Q. Was there any definite and binding agreement to pay it back? A. No.

Q. If not, what was it conditioned on? Was there any condition attached?

A. That they might——

The Court: He has already testified to the condition.

Mr. Andersen: Yes, it has already been asked and answered, your Honor.

Q. Now, you said, Mr. Flint, that Mr. Card called you. Had you contacted anybody in the Company previous to this about going to Portland? Where was the idea initiated? Who initiated it?

Mr. Andersen: I submit he has already testified Mr. Card telephoned from Portland.

Mr. Banfield: But he didn't say anything about the circumstances—at whose request or anything else. I want to know who initiated it.

The Court: He may state how this idea originated.

A. To the best of my knowledge——

Mr. Andersen: I move that be stricken as an opinion and conclusion of the witness.

The Court: Just state what you know.

A. I know that just before the phone call received by me, a [476] week or so before that time,

(Testimony of William H. Flint.)

there were many of our members wanted to go back to work and talked about it on the street.

Mr. Andersen: I move that be stricken as not responsive.

The Court: He is not answering the question.

Q. Do you remember a conversation with Mr. Stamm on this subject? Mr. Stamm, who worked in the office of the Company? A. Yes.

Q. What was that conversation?

The Court: I don't think it is necessary to state that. State whose idea it was that you go to Portland, yours or somebody else's or whose, if you know. A. It was my idea.

Q. When was that idea first conveyed to anybody in the Juneau Spruce Corporation?

A. I conveyed that in the phone conversation with Mr. Card.

Q. Did he call you or——

A. He called me.

Q. In pursuance to any request or on his own? Did you make the request in the first place?

A. He called me at the request of someone else.

Q. Who was the someone else?

A. One of the officers of the Juneau Spruce locally. [477]

Q. Who was he?

A. A Mr. Dick—I can't recall his name. Dick Stamm.

Q. Had you talked to him about going to Portland before you talked to Mr. Card? A. No.

(Testimony of William H. Flint.)

Q. Then the idea originated with Mr. Stamm, you think? A. No.

Mr. Andersen: I move that be stricken.

Q. You say the idea originated with you to go to Portland. How did you get in touch with the Company and how did Mr. Card get in touch with you? A. May I explain?

The Court: All you have to answer is whose idea it was, yours or Mr. Stamm, or Mr. Card—who first had the idea?

A. I did.

The Court: You had the idea to go to Portland before Mr. Card called you up? A. I did.

Q. Did you convey that idea to the Company?

A. Yes, that is right.

Q. By what method?

A. Over the phone to Mr. Card.

Q. How did it happen that Mr. Card called you, if you know?

Mr. Andersen: I submit it is bordering on the ludicrous. I object to the form of the question. It is incompetent, [478] irrelevant and immaterial, and calling for a conclusion and opinion of the witness.

The Court: The only question is with whom the idea originated. He said it originated with him.

Mr. Andersen: After he talked with Mr. Card now, that is the last answer.

Q. Did the idea originate with you after or before you talked to Mr. Card?

Mr. Andersen: I submit, he has already answered that.

(Testimony of William H. Flint.)

The Court: It is in such a state as to warrant further examination.

A. It was while I was talking to Mr. Card.

Q. While you were talking to Mr. Card you got this idea to go to Portland?

A. Yes, that is right.

Q. What were you talking about that gave you the idea?

A. I was talking about our men going back to work or not. He asked me if our Local would go back through the picket line. I said, "No, not until we had a chance to confer with our lawyer and a lawyer who knew the Taft-Hartley law," and if he knew there would be a lawsuit against us or if it would help to go through the picket line, or make it worse, or what the situation was.

Q. Now, Mr. Andersen questioned you about a meeting of last November, about the fifteenth or eighteenth, in the office [479] of the Juneau Spruce Corporation. Was there any proposal at that meeting that anyone arbitrate this dispute?

A. Like I said before, arbitrate—a proposal that we sit down and negotiate it, more than arbitration.

Q. Did anyone propose at the meeting of the eighteenth that this entire matter be left or decided by someone or a group of persons and that that decision be final and binding on everyone?

A. No.

Q. Was any such proposal made by the I.L.W.U. or Mr. Albright at any time in November, 1948, that this be done?

(Testimony of William H. Flint.)

A. In the month of November?

Q. Yes. A. I would say "No."

Q. Now, was the I.W.A. willing to arbitrate this matter and to be bound by the decision of any arbitrator at any time after the picket line, after you walked through the picket line?

A. Yes; I have got to back-track that answer.

Q. You may qualify it.

The Court: Correct it?

A. Up to the time we went through the picket line, that we were willing to settle by arbitration or any means, but after we went through the picket line, we were ready to claim jurisdiction and fight for that jurisdiction. [480]

Q. When did you go through the picket line?

A. July 6.

Q. 1948? A. 1948.

Q. Now in the discussions between April 1, 1948, and the discussion—and going through the picket line in July of 1948, you stated that Mr. Albright did propose arbitration by an Alaskan arbitrator?

A. Yes.

Q. Was there anyone specifically mentioned by Mr. Albright as being this arbitrator?

A. Well, in a way he did, and in a way he didn't, make it a specific name.

Q. Who was to name this arbitrator, according to his proposal?

A. All our arbitration centered around the fact that the logical one to do it would be the Labor

(Testimony of William H. Flint.)

Department in Juneau, the Labor Department of Alaska.

Q. The one of which Mr. Henry Benson is Commissioner of Labor? A. That is right.

Q. You mean it centered about them naming the arbitrator, or Mr. Benson being the arbitrator?

Mr. Andersen: I object to that as complex and suggestive. [481]

The Court: Objection overruled.

Q. Go ahead.

A. Whenever we were talking about arbitration we always worked out of Benson's office. He would seem the logical one to be it, so I imagine that would be who the arbitrator would be.

Q. Was the question of arbitration ever put up to the I.W.A. membership?

A. You mean if we had a legal right?

Q. No; did you ever take a vote in the I.W.A. meetings, between April 1, 1948, and the time you went through the picket line, about three months later to determine whether or not your members would permit Mr. Benson or his Department to arbitrate this matter?

A. No, there was no vote of that type taken.

Q. It never got to the point where you were authorized to submit it?

Mr. Andersen: I object to that as calling for a conclusion and opinion of the witness, and it is leading and suggestive. Counsel's questions are leading.

(Testimony of William H. Flint.)

The Court: He has already answered to that effect. It seems to me that it is not necessary to ask the question.

Q. Were you ever authorized to submit the matter to arbitration?

Mr. Andersen: I object to that on the ground I just [482] stated a moment ago.

The Court: Objection overruled.

A. There was never any actual authorization taken where we would be allowed to submit it to arbitration; no.

Q. Now, you spoke of being present at a meeting with Mr. Benson, and you said the Company. Who did you mean by "the Company"?

A. With Mr. E. H. Card.

Q. And who else was present?

A. Myself, Mr. Card and Mr. Benson. I believe that is all.

Q. Did you ever attend such a meeting with Mr. Card in the office of Mr. Benson at which Mr. Evans was present, a Deputy Commissioner of Labor?

A. I don't think so.

Q. It was just Mr. Benson you think?

A. Mr. Benson.

Q. Mr. Flint, in November, 1948, you have mentioned several meetings with Mr. Albright and Local 16 members for the purpose of discussing this dispute. In these discussions were you able to arrive at a settlement?

A. No.

Q. And if not, what was the thing that prevented

(Testimony of William H. Flint.)

you from coming to an agreement; what was left in dispute?

Mr. Andersen: I object to that as calling for a conclusion. [483]

The Court: Hasn't that been gone over?

Mr. Banfield: No, your Honor, it hasn't been brought out as to the position. All we have had so far is during the period the I.W.A. refused to go through the picket line. They were willing to give up part of this work if the longshoremen proved their claims and respected their picket line until then, and after that, they were unwilling to give up the barge loading or any part of it. I would like to know if that is consistent with any offers made at this time in November, 1948, at the negotiations.

The Court: Very well, but make it brief.

A. The argument was over one man on the dock, who that man would be, would belong to.

Q. One man on the dock?

A. That is right.

Q. And what would he be doing?

A. He would be a man who hooked the lumber onto the gear, slingman.

Q. Slingman? A. One slingman.

Q. Did the longshoremen represent to you that they would do this work with one slingman?

Mr. Andersen: May it please the Court, I object. The question is answered. He said, "one man."

Mr. Banfield: We don't know which. [484]

(Testimony of William H. Flint.)

Q. Which one?

The Court: It would seem to me more accurate to ask if it was over some work rather than which man.

A. It was over who would have the man, or men, who would sling the lumber. I don't know that we discussed how many.

Q. The men?

Mr. Andersen: I move the last part be stricken as a conclusion and opinion of the witness. He said that they were arguing about one man. After counsel makes a speech, now he says "man or men." It is simply narrative, and I move it be stricken.

The Court: Is your objection to the answer or question?

Mr. Andersen: To the answer and question, for the purpose of objection.

The Court: The motion is denied.

Mr. Banfield: If there is any question there, I will withdraw it. I don't know whether there is or not.

Q. What did you offer; that is, the I.W.A., at this series of meetings?

A. Our offer was we would take all jurisdiction on the dock, give the I.L.W.U. all jurisdiction on the barges on the water. In other words, the face of the dock would be the dividing line between our jurisdictions. [485]

Q. The face of the dock would be the dividing line between your jurisdictions? A. Yes.

(Testimony of William H. Flint.)

Q. Who would be the crane operator?

A. Our man.

Q. And who would unhook the slings on the barges and store the lumber on the barges?

Mr. Andersen: I object to that as calling for a conclusion and opinion of the witness.

Mr. Banfield: No; it was an offer.

The Court: Objection overruled. If he knows he may state.

Q. If you know, go ahead.

A. The man who unhooked the lumber would be the men from the Local 16, I.L.W.U.

Q. Did the I.L.W.U. accept that proposal?

A. No.

Q. Did they give any reason for not accepting it?

A. Yes.

Q. What was the reason?

A. They said that they felt they should have a man on the dock also, or men—whatever it was—who would sling the lumber.

Q. Did they say how many men were involved?

A. As I said before, I don't think we got down to just how many it would be. [486]

Q. The summary was that the bullrail was the dividing line?

A. That is right.

Q. That was your proposal, that the bullrail would be the dividing line?

A. Yes.

Q. But they wanted a man on the dock; is that it?

Mr. Andersen: I object.

(Testimony of William H. Flint.)

The Court: It is repetitious. He has already testified to this.

A. Yes.

Mr. Banfield: First, I stated here the other day, may it please the Court, that we were unable to obtain certain telegrams. I believe we have them now.

Q. Do you have them now, Mr. Flint?

A. Yes, I have.

Mr. Banfield: As I represented to the Court, I think Mr. Kirkham testified that after Mr. Card arrived here October 23, 1947, they had a meeting, and a few days thereafter sent a telegram asking authorization from the Union to the International headquarters, and that a reply was received.

Q. Mr. Flint, who has charge of the records of the I.W.A. Local?

A. Right at the present, I have, in conjunction with the lady who we have who is acting as our bookkeeper. [487]

Q. Do you have the copy of a telegram sent sometime between October 23 and November 3 and a copy, that is to the International, and a copy received by Mr. O'Day from the International?

Mr. Andersen: What year?

Q. 1947.

A. I know we had that copy up until the National Labor Relations Board hearing or whether it was submitted for evidence in that, I do not know.

(Testimony of William H. Flint.)

Q. You mean the originals or copies?

A. The original might be in our files or might be in the N.L.R.B. file.

Q. Have you searched for it?

A. Not in the last, I would say, not in the last six months—three or four months.

Q. Have you any copies of those telegrams?

A. I am quite sure we have.

Q. Where did you get the copies?

A. Yesterday I asked our lady, our bookkeeper, to look these up.

Q. And what did she say?

A. She said this is what she found.

Q. In the files? A. In the files.

Mr. Banfield: I will show it to counsel. [488]

Q. Mr. Flint, have you ever seen the originals of these telegrams? A. Yes.

Q. Where did you see them?

A. I have seen them several times in our files.

Mr. Banfield: If the Court please, I will offer these.

Mr. Andersen: May it please the Court, I am not going to make the best evidence objection on counsel's representation.

Mr. Banfield: I am quite sure that we had them at the N.L.R.B. hearing.

The Court: They may be admitted.

Mr. Andersen: I object on the grounds that they are incompetent and immaterial and hearsay.

(Testimony of William H. Flint.)

The Court: I thought you were waiving objection.

Mr. Andersen: I waived only the best evidence objection, may it please the Court.

Mr. Banfield: I will show them to the Court.

The Court: Well, this has in substance already been testified to by Mr. Kirkham?

Mr. Banfield: In part.

Mr. Andersen: The state of the record shows they are entirely incompetent, immaterial and irrelevant. If a position was taken by those telegrams, it was changed by the [489] Local.

Mr. Banfield: What organization?

Mr. Andersen: I.W.A.

Mr. Banfield: If the Court please, this is testimony regarding the making of an agreement on November 3, 1947.

The Court: Objection overruled. They may be admitted.

Mr. Banfield: That is all Mr. Flint, unless you have cross-examination? That will be all Mr. Flint. I will read the telegrams to the jury.

A. Your Honor, will I be allowed to make a legal statement for arguing?

The Court: No, you have merely to answer the questions that are allowed to be asked you.

A. Am I excused?

The Court: The rule is that he should be on the stand while this is read to the jury.

Whereupon the telegrams were marked Plaintiff's

(Testimony of William H. Flint.)

Exhibit No. 8 and Plaintiff's Exhibit No. 9.

Mr. Banfield: This is a telegram dated October 30, 1947, to the International Woodworkers of America, Portland, Oregon. "The Juneau Local of the I.L.W.U. has asked the Union to recognize their dispute with the management of this sawmill and to go on record as to not disputing their jurisdictional line that they load all barges and scows and that they [490] handle all the movement of lumber from sheds to boats, scows, barges and from face of dock. The Company has stated that they will not comply with any of the above demands and that they will load all barges and scows with mill crews which would come under our jurisdiction. As far as we know at the moment this Company intends to load barges and scows here and tow them to Prince Rupert and ship from there by rail to the States. The longshoremen state that they do not want to cause a jurisdictional dispute with us and want us to recognize their demands by majority vote and to recognize their picket lines should they be established. They also state that they have been loading barges and scows for this sawmill for years. We are having a meeting this Saturday night, November 1, and would like to have your views by then as to whether we should recognize all or part of their dispute. Tim O'Day, Local M-271, Box 1951, Juneau, Alaska." That was Plaintiff's Exhibit 8. Plaintiff's Exhibit 9 is a telegram dated October 30, 1947, to Mr. T. O'Day, I.W.A., Local No. M-271, Post Office Box 1951, Juneau, Alaska. "Reurtel as

(Testimony of William H. Flint.)

to I.L.W.U. dispute. Without knowing details of your problem your decision should be made on past practice. If the people involved have been in I.W.A. bargaining unit they should stay there. If this is a new practice of the Company then the mill crew should put the lumber from the sheds to ship side and the longshoremen take it from there and load it with ship gear. The loading [491] of barges, scows, etc., with Company equipment is under our jurisdiction. This is the way it is handled on Pacific Coast. Although we have had minor disputes with longshoremen over this matter we have always won out. If any serious question comes up over jurisdiction it should be placed before C. I. O. Regional Director, Chris Hennings, Juneau, Alaska. If not settled there C. I. O. Jurisdictional Committee. Keep us informed on outcome. Send up-to-date contract with Company. If no extra copy we will make copy and return to you. Virgil Burtz, Acting Secretary-Treasurer, International Woodworkers of America, Portland, Oregon."

Mr. Andersen: There will be no further questions, your Honor.

Mr. Banfield: You may be excused.

(Witness excused.)

